Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

CRAIG AVERY CASLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari
To the District Court of Appeal
of Florida, Fifth District

PETITION FOR WRIT OF CERTIORARI

WARREN W. LINDSEY
KIRKCONNELL, LINDSEY,
SNURE AND YATES, P.A.
P.O. Box 2728
Winter Park, FL 32790
Telephone: (407) 644-7600
Florida Bar. No. 299111

QUESTIONS PRESENTED

1. Whether a defendant is provided ineffective assistance of counsel when his trial attorney fails to bring the perceived mental incompetency of the defendant, during a critical stage of the proceedings, to the attention of the trial court.

2. Whether a defendant is provided ineffective assistance of counsel when his trial attorney fails to object to the prosecutor's incomplete and misleading explanation of the definition of premeditation necessary to support a conviction for first degree murder.

3. Whether a trial court can deny a defendant's claim of ineffectiveness of counsel, based on counsel's failure to seek suppression of evidence, on grounds that the attorney made a reasonable strategy decision, without conducting an evidentiary hearing.

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OPINION BELOW

The opinion of the District Court of Appeal of Florida, Fifth District (Pet. App. at 1), is reported at 871 So. 2d 957 (Fla. 5th DCA 2004).

JURISDICTION

The judgment to be reviewed was entered by the District Court of Appeal of Florida, Fifth District, was entered on April 2, 2004. The district court denied Petitioner's timely motion for rehearing on April 2, 2004. (Pet. App. at 5). The nature of the district court's opinion rendered Petitioner unable to invoke the discretionary jurisdiction of the Florida Supreme Court. Thus, the district court was Petitioner's state court of last resort. This Court has jurisdiction pursuant to 28 U.S.C. § 1257. This case involves questions of federal law that were decided by a state court of last resort in a way that conflicts with relevant decisions of this Court.

APPLICABLE CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

STATEMENT OF CASE

Petitioner, Craig Avery Casler, was charged by Indictment with first degree murder, in violation of Fla. Stat. §§ 782.04 and 775.087. (R5-920)[1]. After a jury trial, Petitioner was convicted as charged and sentenced to life in prison without the possibility of parole. (R7 at 1101-1104).

Petitioner subsequently filed a Motion for Postconviction Relief, pursuant to Fla. R. Crim. P. 3.850, in which he raised 10 grounds for relief. (Pet. App. at 62). In that motion, Petitioner argued, inter alia, that he was provided ineffective assistance of counsel because: (1) trial counsel failed to seek suppression of the oral, taped, and written statements obtained from Petitioner by law enforcement shortly after he was arrested and introduced those statements into evidence in the defense case-in-chief (Issue 7 of the Motion); (2) trial counsel failed object to the State's closing argument in which it provided the jury with an incomplete and misleading explanation of the premeditation necessary for a conviction of first degree murder (Issue 6 of the Motion); and (3) trial counsel conveyed the State's plea offer to him in an informational vacuum. (Issue 10 of the Motion). (Pet. App. at 62).

The trial court granted Petitioner an evidentiary hearing solely on Issue 10. (R7-1259). At the evidentiary hearing, Petitioner's attorney, F. Wesley Blankner, provided testimony. (RS[2] at 1400-45). Blankner testified about his discussions with Petitioner

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[1] Record citations are laid out in the following manner: (R2 at 6 = Volume 2 of the Record at Page 6).

[2] (RS = Supplemental Record).

concerning the second-degree-murder plea offer made by the State immediately prior to jury selection in Petitioner's trial.

Blankner acknowledged that there was a discussion on the record prior to the commencement of jury selection on May 11, 1998, where he told the trial court that the sentencing guidelines range for the state's plea offer was 30 to 50 years in prison. Blankner was corrected by the prosecutor, who indicated that 30 years was the middle of the guidelines, and thus, that the applicable range was from approximately 22.5 to 37.5 years in prison. (RS at 1428-1431; R1 at 71-73).

Blankner further testified that, in his 25 years of practice, Petitioner was the most difficult client he had ever had to communicate with. (RS at 1402, 1419). Blankner also stated that, on the day he relayed the plea offer to Petitioner, he believed that Petitioner was not mentally competent to understand the ramifications of that offer. (RS at 1431-32, 37-39).

Both Petitioner and the State provided the trial court with their final arguments in writing. Based on Blankner's testimony at the evidentiary hearing, Petitioner argued that he was deprived of the effective assistance of counsel when Blankner failed to bring his perceived mental incompetency to the attention of the trial court. (Pet. App. at 47). The trial court subsequently denied Petitioner's Rule 3.850 motion in its entirety. (Pet. App. at 41).

The trial court denied relief on Issue 6 of Petitioner's motion (IAC-improper closing argument) without an evidentiary hearing, concluding that Petitioner suffered no prejudice from any inaccurate statement of the law the prosecutor may have made concerning the element of premeditation. (Pet. App. at 41).

The trial court denied relief on Issue 7 of Petitioner's Motion (IAC-failure to seek suppression of defendant's statements),

concluding, without an evidentiary hearing, that trial counsel reasonably used the Petitioner's statements to bolster his insanity and voluntary intoxication defenses. (Pet. App. at 41).

The trial court denied Petitioner's Rule 3.850 motion without addressing his claim that trial counsel provided ineffective assistance of counsel by failing to bring his perceived inability and incompetency in participating in plea discussions to the attention of the trial court. (Pet. App. at 41). Petitioner filed a timely notice of appeal from the trial court's denial of his motion for postconviction relief. (R7-1348). On appeal, Petitioner argued, inter alia, that he was provided ineffective assistance of counsel because his trial attorney had (1) failed to bring his perceived incompetency to the attention of the trial court at a critical stage the proceedings; (2) failed to object to the prosecutor's improper closing argument regarding the definition of premeditation; and (3) had failed to seek suppression of his involuntary statements. Petitioner further argued that the trial court had erred in denying claims (2) and (3) without an evidentiary hearing. (Pet. App. at 6).

The District Court of Appeal of Florida, Fifth District, affirmed the trial court's decision to deny Petitioner's Rule 3.850 motion. The district court failed to specifically address the three claims contained in this petition, but merely concluded that "there is evidence to support the trial judge's decision." (Pet. App. at 1). Petitioner filed a timely Motion for Rehearing/Clarification, seeking to obtain the basis for the district court's ruling. The district court denied Petitioner's motion. (Pet. App. at 5).

ARGUMENT

I. PETITIONER WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL ATTORNEY FAILED TO BRING HIS PERCEIVED INCOMPETENCY, DURING A CRITICAL STAGE OF THE PROCEEDINGS, TO THE ATTENTION OF THE TRIAL COURT.

The testimony of trial counsel Blankner at the evidentiary hearing established that he provided Petitioner with ineffective assistance of counsel at a critical stage of the proceedings. Despite his belief that Petitioner was mentally incompetent and unable to understand the plea offer made by the State immediately prior to trial, Blankner failed to convey that belief to the trial court.

"The Sixth Amendment secures to a defendant facing incarceration the right to counsel at all "critical stages" of the criminal process." *Iowa v. Tovar*, 124 S.Ct. 1379, 1387, 158 L.Ed.2d 209 (2004). A trial is rendered fundamentally unfair if the accused is denied counsel at a critical stage of the proceedings. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronic*, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044, 80 L.Ed.2d 657 (1984).

"As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.'" There is an exception, however, where the defendant has been deprived of the assistance of counsel during a critical stage of the proceedings. In such a case, there is a presumption that the defendant has been denied his right to a fair trial. *Mickens*

v. Taylor, 535 U.S. 162, 166, 122 S.Ct. 1237, 1241, 152 L.Ed.2d 291 (2002); *Roe v. Flores-Ortega*, 528 U.S. 470, 483, 120 S.Ct. 1029, 1038, 145 L.Ed. 2d 985 (2000).

This Court had consistently recognized that proceedings relating to the process of entering a plea are a critical stage. *Tovar, supra*; *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *White v. Maryland*, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963).

The test of a defendant's competency to stand trial is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding–and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 363 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (emphasis added); *See also Cooper v. Oklahoma*, 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 499 (1996); *Hunter v. State*, 660 So. 2d 244, 247 (Fla. 1995). "The right not to stand trial while incompetent is sufficiently important to merit protection even if the defendant has failed to make a timely request for a competency determination." *Cooper*, 517 U.S. at 1377 n.4.

Since a finding of incompetency precludes the state from seeking a conviction, the failure to take action to determine a defendant's competency constitutes ineffective assistance of counsel where there is evidence to support the defendant's incompetency. *Broomfield v. State*, 788 So. 2d 1043 (Fla. 2d DCA 2001).

In this instant case, Petitioner's trial counsel, F. Wesley Blankner provided unequivocal testimony that, on the day he relayed the State's plea offer to Petitioner, he believed that Petitioner was not competent to understand the ramifications of that offer. When asked to clarify that testimony, Blankner confirmed that, when he conveyed the plea offer to Petitioner immediately prior to the start

of jury selection, he did not believe that Petitioner was mentally competent to stand trial. (RS at 1431-32, 37-39).

Despite Blankner's belief that Petitioner was not mentally competent to proceed to trial, and that he did understand the ramifications of the plea offer being conveyed to him, Blankner failed to raise this issue with the trial court. He did not file a motion to declare Petitioner incompetent or even mention his belief to the trial court. As clearly defined by this Court, the proceedings relating to a defendant's decision to enter a plea are a critical stage of the proceedings. Therefore, Petitioner was completely deprived of the effective assistance of counsel, and his subsequent trial should be considered presumptively unfair.

The fact that Blankner had previously filed a motion to have Petitioner declared mentally incompetent to proceed to trial, which had been denied by the trial court, does not establish that his conduct was not ineffective. "Once a defendant is declared competent, the trial court must still be receptive to revisiting the issue if circumstances change." *Hunter*, 660 So. 2d at 248; *See also Drope v. Missouri*, 420 U.S. 162, 180-81, 95 S.Ct. 896, 908, 43 L.Ed.2d 103 (1975).

Under Florida law, pursuant to Fla. R. Crim. P. 3.210, an attorney is permitted to file a motion to declare a defendant mentally incompetent to proceed at any time the attorney has "reasonable grounds" to believe the defendant is incompetent. Rule 3.210(b) provides, in pertinent part, the following:

> If, at any material stage of a criminal proceeding, the court of its own motion, or upon motion of counsel for the defendant or for the state, has reasonable grounds to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a

> hearing to determine the defendant's mental condition.

Here, Blanker provided unrefuted testimony that, at the time he conveyed the State's plea offer to Petitioner, he did not believe that Petitioner was competent to understand the ramifications of that offer. Therefore, immediately prior to the commencement of Petitioner's trial, Blanker had reasonable grounds to believe that Petitioner did not have a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding. *See Cooper, Dusky, supra*. Blankner's failure to make the trial court aware of this belief, through a motion to declare Petitioner incompetent to stand trial, constitutes ineffective assistance of counsel.

Both the state trial court and the district court failed to specifically address this issue, despite the fact that it was timely raised in Petitioner's final argument on his Rule 3.850 motion, and in Petitioner's Initial Brief. (Pet. App. at 6, 47). The decisions of those courts to deny relief to Petitioner is contrary to the aforementioned decisions of this Court. Accordingly, the Petition for Writ of Certiorari should be granted on this issue.

II. PETITIONER WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL ATTORNEY FAILED TO OBJECT TO THE PROSECUTOR'S INCOMPLETE AND MISLEADING EXPLANATION OF THE DEFINITION OF "PREMEDITATION" NECESSARY TO SUPPORT A CONVICTION FOR THE CRIME OF FIRST DEGREE MURDER.

Petitioner was deprived of the effective assistance of counsel when his trial attorney failed to object to the prosecutor's repeated incomplete and misleading explanation of premeditation during closing argument. Trial counsel's action was both deficient and highly prejudicial to Petitioner.

In order to establish a valid claim of ineffective assistance of counsel, a defendant must establish (1) that trial counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. To show a reasonable probability, the defendant must merely establish a probability sufficient to undermine confidence in the outcome, not that counsel's error definitely altered the outcome of the trial. 466 U.S. at 695.

Under Florida law, premeditation is defined as follows:

> more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must exist for a sufficient length of time to permit

reflection as to the nature of the act to be committed and the probable result of the act.

Coolen v. State, 690 So. 2d 738, 741 (Fla. 1997) (emphasis added); *See also Evans v. State*, 838 So. 2d 1090, 1095 (Fla. 2002); Fla. Std. Jury Instr. (Crim.) 7.2.

The improper comments of the prosecutor in the instant case are extremely similar to those in *Waters v. State*, 486 So. 2d 614 (Fla. 5th DCA 1986). In *Waters*, during jury selection, the prosecutor defined premeditation as "killing after consciously deciding to do so" and "operation of the mind." The prosecutor failed to include "reflection," which is an integral second requirement for premeditation. The district court held that the trial court erred in permitting the prosecutor to define premeditation in this manner because it allowed the improper definition to form in the jury's mind. The district court reversed the defendant's conviction and remanded the case for a new trial.

The district court's opinion in *Waters* makes no mention of the instruction on premeditation the trial court provided to the jury at the close of the case. Based on this lack of discussion, Petitioner assumes that the trial court properly defined premeditation, but that the district court concluded that the trial court's action did not cure the error by the prosecutor.

On two separate occasions, the prosecutor in the instant case provided the jury with an incomplete and misleading definition of premeditation by failing to include the element of reflection. First the prosecutor, in explaining premeditation, stated that "[a]ll we have to prove to you beyond a reasonable doubt is that when he killed her, that in his mind at that moment was a decision that he wanted her to be dead. That's all." (R4-741) (emphasis added). The prosecutor further stated that "if you are convinced beyond a reasonable doubt that when he wrapped that ligature

around her neck and squeezed it, he did so because he had decided he wanted her dead, then we have met our burden. That's all we have to do." (R5-742) (emphasis added).

Both of these statements failed to include the element of reflection necessary to establish premeditation. At the end of each statement, the prosecutor stated that the description he had just provided was all that he was required to prove. Therefore, the prosecutor provided the jury with two different incomplete and misleading definitions of premeditation.

As in *Waters*, an improper definition of premeditation was allowed to form in the jury's mind. The sole difference between a conviction of first degree murder (life sentence without possibility of parole) and conviction of second degree murder (determinate sentence) was the jury's determination that the killing was premeditated.

In denying Petitioner's claim on this issue, the trial court merely concluded that "Defendant suffered no prejudice from any inaccurate statement of law the prosecutor may have made." In further support of its decision, the trial court cited the fact that the jury was properly instructed by the court on the issue of premeditation and that the jury was told that the closing arguments of counsel did not constitute evidence. (Pet. App. at 41). Neither of these facts were sufficient to cure the effect of the prosecutor's repeated misstatement of the law on this critical issue, because the incorrect definition of premeditation was allowed to form in the jury's mind. *See Waters*, *supra*. Moreover, the trial court made no finding as to the deficiency of counsel and failed to further explain why no prejudice resulted from the prosecutor's repeated misstatement of the law. (Pet. App. at 41).

Trial counsel's failure to object to the prosecutor's improper closing argument was both deficient and highly prejudicial. There

is a reasonable probability that, in absence of the prosecutor's repeated misstatement of law on the issue of premeditation, Petitioner would not have been convicted of first degree murder. The improper definition provided to the jury clearly undermines confidence in the verdict.

Therefore, the trial court's decision to deny Petitioner relief on this claim without an evidentiary hearing, and the district court's summary denial of this claim is directly contrary to *Strickland* and its progeny. Accordingly, this Court should grant the Petition for Writ of Certiorari on this issue.

III. THE TRIAL COURT IMPROPERLY DENIED PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, BASED ON COUNSEL'S FAILURE TO SEEK SUPPRESSION OF EVIDENCE, ON GROUNDS THAT THE ATTORNEY MADE A REASONABLE STRATEGY DECISION, WITHOUT CONDUCTING AN EVIDENTIARY HEARING.

Both trial counsel's failure to seek the suppression of Petitioner's statements, and his actions in introducing those statements into evidence at trial constituted ineffective assistance of counsel. Trial counsel's actions were both deficient and highly prejudicial to Petitioner. The trial court's decision to deny Petitioner's Rule 3.850 Motion on this issue, based solely on a conclusion that trial counsel's decision not to seek suppression and to use the statements in support of Petitioner's defense, was a reasonable strategy decision, was improper in absence of an evidentiary hearing.

Clearly, any confession or statement on the part of a defendant must be voluntary before it is admissible at trial. Such a confession may be inadmissible as involuntary while a defendant is under the influence of alcohol or narcotics. *Cox v. State*, 711 So. 2d 1323 (Fla. 5th DCA 1998) (confession only voluntary where defendant is able to comprehend what he is doing and to communicate with coherence and rationality).

In the instant case, both the circumstances surrounding Petitioner's statements and the content of the statements establish that they were not voluntary. (R4 at 635, 637-44, 45). There was substantial evidence that Petitioner was highly intoxicated and suffering from mental illness at the time he provided those statements. Based on those facts, trial counsel had legal grounds to seek suppression of those statements, but chose not to do so. Instead, trial counsel introduced those statements in the defense case in chief.

The introduction of Petitioner's statements were highly prejudicial because they (1) corroborated the testimony of James Cook, the individual who discovered Petitioner with the dead body of the victim; (2) corroborated the motive for murder advanced by the state; and (3) contradicted the defense that Petitioner was in an "alcoholic blackout" at the time of the offense.

Despite these facts, the trial court failed to conduct an evidentiary hearing on this issue. The trial court merely concluded that the actions of trial counsel were reasonable strategy, because the statements were used to support Petitioner's insanity and voluntary intoxication defenses. The trial court did not cite to the record in support of its decision. (Pet. App. at 41).

The trial court's decision, affirmed by the district court without specific reference to this issue, was improper. Several Florida appellate courts have held that the evaluation of strategic

decisions requires resolution through an evidentiary hearing. *McCann v. State*, 854 So. 2d 788 (Fla. 2d DCA 2003); *Guisasola v. State*, 667 So. 2d 248 (Fla. 1st DCA 1995); *Comfort v. State*, 597 So. 2d 944 (Fla. 2d DCA 1992).

The trial court's decision is improper because the reason trial counsel did not seek pretrial suppression and introduced Petitioner's statements into evidence does not appear in the record. Even if trial counsel introduced the statements in order to bolster Petitioner's defenses, such a strategy cannot be considered reasonable when the statements also corroborate the testimony of the state's main witness and provide the jury with a motive for the charged offense.

This Court addressed a similar situation in *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). In *Morrison*, the defendant claimed he was provided ineffective assistance of counsel based on trial counsel's failure to file a pretrial motion to suppress evidence allegedly obtained in violation of the Fourth Amendment. After concluding that the defendant's claim was not precluded from being reviewed in federal court because it involved a Fourth Amendment issue, and that counsel had acted incompetently, this Court remanded the case for an evidentiary hearing on the issue of prejudice. The Court concluded that, in absence of an evidentiary hearing, the record was insufficient on this issue.

In the instant case, the record is insufficient on both the issue of counsel's competency and the resulting prejudice, because no evidentiary hearing was conducted on this issue. There has been no inquiry into either the actual reason for counsel's actions or into the conversations counsel had with Petitioner on this matter. In *Strickland*, this Court explicitly noted that inquiry into counsel's conversations with the defendant may be critical to a

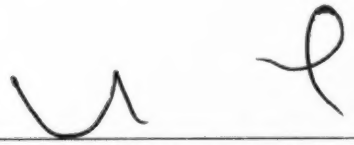
proper assessment of a trial counsel's litigation decisions. 466 U.S. at 691.

Therefore, this Court should adopt the rule established by the aforementioned state courts, that an evidentiary hearing is required to evaluate strategic decisions of trial counsel. Accordingly, this Court grant the Petition for Writ of Certiorari on this issue.

CONCLUSION

For the reasons stated above, CRAIG AVERY CASLER respectfully petitions this Court for a writ of certiorari.

Respectfully Submitted,



WARREN W. LINDSEY
KIRKCONNELL, LINDSEY,
SNURE AND YATES, P.A.
P.O. Box 2728
Winter Park, FL 32790
Telephone: (407) 644-7600
Florida Bar. No. 299111

Attorney for Petitioner

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WARREN W. LINDSEY
KIRKCONNELL, LINDSEY,
SNURE AND YATES, P.A.
P.O. Box 2728
Winter Park, FL 32790
Telephone: (407) 644-7600
Florida Bar. No. 299111

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IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA

FIFTH DISTRICT JANUARY TERM 2004

CRAIG AVERY CASLER,

Appellant,

v. CASE NO. 5D03-299

STATE OF FLORIDA,

Appellee.

_____/

Opinion Filed April 2, 2004

3.850 Appeal from the Circuit Court
for Orange County,
Belvin Perry, Jr., Judge.

Warren W. Lindsey and William R. Ponall,
of Kirkconnell, Lindsey, Snure and Yates, P.A.,
Winter Park, for Appellant.

Charles J. Christ, Jr., Attorney General, Tallahassee,
and Robin A. Compton, Assistant Attorney General,
Daytona Beach, for Appellee.

GRIFFIN, J.

Craig Avery Casler ["Casler"] appeals the lower court's order denying his Rule 3.850 motion for post-conviction relief.

On November 25, 1996, Casler was charged by grand jury indictment with murder in the first degree of Judith M. Johnson by blunt force trauma to the head and neck. On May 15, 1998, the jury found and the court adjudicated Casler guilty as charged. He was sentenced to life imprisonment without the possibility of parole.

He has raised twelve grounds for post-conviction relief in his rule 3.850 motion. All were denied without a hearing except ground ten. In ground ten, he contended that his trial counsel was ineffective for communicating the State's plea offer to him in an "informational vacuum."

At the evidentiary hearing, Casler and his mother testified, as did trial counsel. Trial counsel testified he had concerns early on in the process regarding Casler's competence to stand trial and his sanity at the time of the offense due to his extremely severe alcohol problem. He said that Casler was probably the most difficult client he had ever dealt with in trying to get a logical train of circumstances and events from him, and that it was difficult to get Casler to focus on any one point for any length of time. Counsel testified that Casler knew he was under arrest for first-degree murder, and that he had explained the possible penalties to him as well. He stated he had discussed the evidence with Casler and he believed Casler had understood the importance of the available evidence.

There were discussions regarding a plea to a lesser offense and counsel testified that he carried those discussions back to Casler, Casler's mother and Casler's stepfather. Counsel said that when he discussed a plea to second-degree murder with Casler, Casler discounted it. He said he did not recall a term of

years being offered by the State, but he did recall telling Casler the twenty-year range would probably be a best case scenario. He testified that Casler never expressed an interest in pleading to second-degree murder. Counsel stated that, as trial got closer, he thought Casler should consider a plea because he did not feel Casler would be acquitted by a jury due to some of the State's evidence and the fact that they could not find a relevant basis to impeach the State's key witness, all of which he discussed with Casler. Counsel testified that he recommended that Casler attempt to work out a plea with the State, but that Casler's reaction was he was not going to plead to second-degree murder. He reiterated that he believe Casler had understood the penalties he would face if he entered a plea and that he was facing life in prison if he did not enter a plea. He stated he discussed the possibility of Casler entering a plea "many times."

On cross-examination, counsel acknowledged that his assessment of the case was that there was no real evidence of premeditation on Casler's part. He also conceded that he did not have any notations in his file regarding plea offers or any written document regarding plea offers.

Casler called his mother, Ellen Jarvis ["Jarvis"], as a rebuttal witness. Jarvis testified that counsel never discussed any plea offers made by the State with her, and never recommended to her that Casler should enter a plea to second-degree murder. She stated she remembered very few conversations with counsel.

The State then recalled counsel, who testified that he spoke very frequently with Jarvis about the case; she came down to his office on occasion and would call him on the phone regularly at home, the office, or on his cell phone; and he had lunch at her residence at least twice to discuss the case.

On December 20, 2002, the court entered an order denying Casler's motion for post-conviction relief. The court found on ground ten that, in weighing the testimony of Casler and counsel, Casler was adequately informed of the plea offers and the surrounding circumstances.

Ineffective assistance of counsel claims are mixed questions of fact and law. *Valle v. State*, 778 So.2d 960, 966 (Fla. 2001)(citing *Stephens v. State*, 748 So.2d 1028 (Fla. 1999)). When an appellate court reviews the trial court's factual findings, it defers to those factual findings if they are supported by competent substantial evidence in the record. *Id.* Here, there is evidence to support the trial judge's decision. Accordingly, we affirm.

AFFIRMED.

THOMPSON and PLEUS, JJ., concur.

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FIFTH DISTRICT

CRAIG AVERY CASLER,
Appellant,

v. CASE NO. 5D03-299

STATE OF FLORIDA,
Appelle.

_____/

DATE: May 5, 2004

BY ORDER OF THE COURT:

ORDERED that Appellant's MOTION FOR REHEARING AND/OR CLARIFICATION, filed April 19, 2004, is denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

s/Frank J. Habershaw

FRANK J. HABERSHAW, CLERK
(Seal)
DISTRICT COURT OF APPEAL
STATE OF FLORIDA

cc: Office of the Attorney General, Daytona Beach
Warren W. Lindsey, Esq. And William H. Ponall, Esq.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

CRAIG AVERY CASLER, CASE NO. 5D03-299

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT

WARREN W. LINDSEY
KIRKCONNELL, LINDSEY,
SNURE AND YATES, P.A.
1150 Louisiana Avenue, Suite 1
P.O. Box 2728
Winter Park, FL 32790-2728
Telephone: (407) 644-7600
Florida Bar No. 299111

WILLIAM R. PONALL
KIRKCONNELL, LINDSEY,
SNURE AND YATES, P.A.
1150 Louisiana Avenue, Suite 1
P.O. Box 2728
Winter Park, FL 32790-2728
Telephone: (407) 644-7600
Florida Bar No. 421634
Attorneys for Appellant

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STATEMENT OF THE CASE AND FACTS

Craig Casler was charged by Indictment with first degree murder, in violation of Fla. Stat. §§ 782.04 and 775.087. (R5-920)[1]. After a jury trial, Mr. Casler was convicted as charged and sentenced to life in prison without the possibility of parole. (R7 at 1101-1104).

Mr. Casler subsequently filed a Motion for Postconviction Relief, pursuant to Fla. R. Crim. P. 3.850. (R6-1133). In that motion, Mr. Casler argued that he was provided ineffective assistance of counsel because: (1) trial counsel improperly handled the presentation of the defense case and witnesses by opening the door to the introduction of the alleged prior bad act "Linda Bray Assault Incident;" (2) trial counsel failed to adequately prepare Dr. Glenn Caddy to provide trial testimony without opening the door to cross-examination about the "Linda Bray incident and to be prepared for questions about that incident should they be raised on cross-examination;" (3) trial counsel failed to adequately prepare Mr. Casler to provide trial testimony without opening the door to the jury hearing about Mr. Casler's alleged violent actions towards Linda Bray; (4) trial counsel erroneously recommended that Mr. Casler testify at trial; (5) trial counsel failed to object to the prosecution's cross-examination of Dr. Caddy, where he improperly suggested that Mr. Casler had an extensive, extremely violent criminal history and that Mr. Caddy had been remiss in not obtaining an accurate picture of the Mr. Casler's criminal history from the State; (6) trial counsel failed to object to the prosecutor's closing argument, despite the prosecutor providing the jury with incomplete and misleading explanations on the definition of "premeditation;" (7) trial counsel failed to seek suppression of the oral, taped, and written statements obtained from Mr. Casler by

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[1] Record citations are laid out in the following manner: (R2 at 6 = Volume 2 of the Record at Page 6).

law enforcement shortly after he was arrested and introduced those statements into evidence in the defense case-in-chief; (8) trial counsel failed to pursue both DNA testing of fingernail scrapings taken from the decedent Judith Johnson, and laboratory testing of vaginal swabs taken from the decedent; (9) trial counsel made comments about the medical examiner in his closing argument that were not supported by the evidence; (10) trial counsel communicated the State's plea offer to Mr. Casler in an informational vacuum; and (11) trial counsel failed to adequately prepare Mr. Casler as a witness before putting him on the stand to testify. Finally, Mr. Casler argued that (12) the cumulative errors of trial counsel entitled him to postconviction relief. (R6 at 1133-1169).

The trial court entered an Order directing the State to file a response to Mr. Casler's motion. (R6-1174). The State filed a response, conceding that an evidentiary hearing was required on Issue 10. (R6 at 1177-1200; R7 at 120-1258).

The trial court granted Mr. Casler an evidentiary hearing solely on Issue 10. (R7-1259). At the hearing, Mr. Casler testified concerning trial counsel's actions in providing him with the state's plea offer. He testified that trial counsel came to him with a offer from the state to plead to second degree murder on the morning of May 12, 1998, prior to the commencement of opening statements in the case. (RS[2] at 1364-65). Mr. Casler further testified that trial counsel told him he would receive about 22 years in prison if he accepted the state's plea offer. Mr. Casler also stated that trial counsel never explained to him, at any time during the case, that if he was convicted at trial he would be sentenced to life in prison without the possibility of parole. (RS at 1365-68).

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[2] RS refers to the supplemental record including the entire text of the evidentiary hearing held on August 30, 2002.

Mr. Casler testified that trial counsel did not spend very much time with him prior to the trial and never explained to him the strengths and weaknesses of the state's case against him. He stated that trial counsel never disclosed the fact that pretrial discovery had not produced any significant evidence to impeach the credibility of the state's main witness, James Cook. Likewise, trial counsel had never told him that, if the jury believed Cook's testimony, he would probably be convicted of first degree murder. He further testified that trial counsel had never made a plea recommendation or informed of the ability to earn gain time on the sentence he would receive if he entered the plea. Mr. Casler testified that trial counsel did not communicate with him frequently or in any detail about the case, and that he had never received any type of written document from trial counsel laying out the terms of the state's plea offer. (RS at 1369- 1376).

Finally, Mr. Casler testified that the entire discussion of the state's plea offer between trial counsel and himself was very short. (RS-1366). Mr. Casler repeatedly testified that, had trial counsel properly advised him of the strengths and weaknesses of the state's case, the sentencing guidelines, and the sentence he faced if convicted at trial, he would have accepted the state's offer and plead to second degree murder. (RS at 1368, 1374, 1375, 1376).

Mr. Casler's trial counsel, F. Wesley Blanker, also provided testimony at the evidentiary hearing. (RS at 1400-45). Blankner testified that he believe the plea offered by the state called for a sentence pursuant to the guidelines that applied at that time. He stated that he had no office notes, memoranda, or any written documents that memorialized the plea offer made by the state or any discussions he had with Mr. Casler concerning that offer. Blankner testified that he had no idea what the sentencing guidelines would have been for Mr. Casler had he accepted the state's offer and that he had no scoresheets or documents in his

files which indicated that he had previously computed the sentencing guidelines range. (RS at 1417-1434).

Blankner acknowledged that there was a discussion on the record prior to the commencement of jury selection on May 11, 1998, where he told the trial court that the sentencing guidelines range for the state's plea offer was 30 to 50 years in prison. Blankner was corrected by the prosecutor, who indicated that 30 years was the middle of the guidelines, and thus, that the applicable range was from approximately 22.5 to 37.5 years in prison. (RS at 1428-1431; R1 at 71-73).

Blankner further testified that, in his 25 years of practice, Mr. Casler was the most difficult client he had ever had to communicate with. (RS at 1402, 1419). Blankner also stated that, on the day he relayed the plea offer to Mr. Casler, he believed that Mr. Casler was not competent to understand the ramifications of that offer. (RS at 1431-32). Finally, Mr. Blankner testified that he also discussed the state's plea offer with Mr. Casler's mother, Ellen Jarvis. (RS at 1442).

Mrs. Jarvis specifically testified at the evidentiary hearing that she was the individual who had hired Blankner to represent her son in this case. Mrs. Jarvis testified, however, that Blankner had never discussed a plea offer from the state to resolve Mr. Casler's case. (RS at 1445-48).

Both Mr. Casler and the State provided the trial court with their final arguments in writing. (R7-1265, 1290). The trial court subsequently denied all of Mr. Casler's claims. (R7-1320)

The trial court denied Issues 1-9, and 11-12 without an evidentiary hearing. The trial court denied relief on Issue 1, stating that "[a]lthough counsel could have instructed Defendant "to focus his testimony on the charged offense," counsel was under no duty to

instruct Defendant not to lie on the stand. Moreover, any failure by counsel to inform Defendant of his obligation to tell the truth was cured when Defendant stood before the Court and swore an oath to do so. Accordingly, Defendant "opened the door," not counsel." (R7 at 1320-21).

The trial court denied relief on Issue 2, stating that the record reflects that Dr. Caddy was informed of the Linda Bray incident by defense counsel, and took that information into consideration in formulating his opinion. The court further reasoned that the trial court adequately limited the State's questioning of Dr. Caddy about "the Linda Bray incident" after defense counsel successfully argued that the State was asking improper questions. Finally, the trial court stated that any further argument concerning the admissibility of evidence concerning "the Linda Bray incident" was properly preserved and should have been raised on direct appeal. (R7-1321).

The trial court denied relief on Issue 3, citing the reasons it provided for denying relief on Issue 1. The trial court provided no other reasons for its denial of relief on this issue. (R7-1321).

The trial court denied relief on Issue 4, stating that "Defendant's testimony was essential to his defenses of insanity and voluntary intoxication because there were no witnesses who could testify to Defendant's mental state and sobriety at the time of the murder." (R7-1321).

The trial court denied relief on Issue 5, citing to the reasons it provided for its denial of Issue 2. Additionally, the trial court stated that this issue should have been, and was, raised on direct appeal. (R7-1322).

The trial court denied relief on Issue 6, stating that Defendant had suffered no prejudice from any misstatement of law the prosecutor

may have made concerning the element of premeditation. (R7 at 1322-23).

The trial court denied relief on Issue 7, concluding that trial counsel reasonably used the Defendant's statements to bolster his insanity and voluntary intoxication defenses. (R7-1323).

The trial court denied relief on Issue 8, stating that Defendant's allegations were conclusory and speculative. Additionally, the trial court concluded that, even if the DNA evidence excluded Defendant, there was "no reasonable probability that Defendant would have been acquitted." (R7-1323).

The trial court denied Issue 9, stating that defense counsel's closing arguments were reasonable based on the testimony of the medical examiner. (R7 at 1323-24).

The trial court denied relief on Issue 11, citing the reasons it providing for denying relief on Issues 1 and 3. (R7 at 1324).

The trial court denied relief on Issue 12, holding that, in light of its conclusions on all the other issues, Mr. Casler was not entitled to relief based on cumulative error. (R7-1324).

The trial court also denied Issue 10, the sole issue on which it provided Mr. Casler an evidentiary hearing. The trial court concluded that "Defendant was adequately informed of the plea offers and the surrounding circumstances, and decided to pursue his case at trial." (R7-1324).

Mr. Casler filed a timely notice of appeal from the trial counsel denial of his motion for postconviction relief. (R7-1348). This appeal ensued.

SUMMARY OF THE ARGUMENT

The trial court erred in denying Mr. Casler's motion for postconviction relief. The trial court, after conducting an evidentiary hearing, improperly denied Mr. Casler's claim that trial counsel provided him with ineffective assistance of counsel by communicating the state's plea offer to him in an informational vacuum.

Mr. Casler's trial attorney never accurately conveyed to him the actual sentence he would serve if he accepted the state's offer or the sentence he would receive if he was convicted at trial. Likewise, trial counsel did not adequately inform Mr. Casler of the strengths and weaknesses of the state's case against him. Therefore, Mr. Casler rejected the State's plea offer based on the incomplete information provided to him by trial counsel. Mr. Casler would have accepted the State's plea offer had he been properly informed. Finally, had Mr. Casler accepted the State's plea offer, he would have received a far lesser sentence than the one that was actually imposed.

Additionally, trial counsel provided Mr. Casler with ineffective assistance of counsel by failing to bring the perceived incompetence of Mr. Casler to the attention of the trial court.

Finally, the trial court also erred in summarily denying the eleven other facially valid claims in Mr. Casler's motion for postconviction relief. Neither the reasoning nor the record attachments provided by the trial court conclusively refute the merit of those claims.

ARGUMENT

I THE TRIAL COURT ERRED IN DENYING MR. CASLER RELIEF ON CLAIM 10 OF HIS MOTION FOR POSTCONVICTION RELIEF AFTER CONDUCTING AN EVIDENTIARY HEARING.

A. MR. CASLER WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL CONVEYED THE STATE'S PLEA OFFER TO HIM IN AN INFORMATIONAL VACUUM.

Mr. Casler rejected the State's plea offer based solely on the woefully inadequate information provided to him by trial counsel. Thus, Mr. Casler was provided ineffective assistance of counsel and the trial court erred in denying his motion for postconviction relief.

In order to prevail on a claim of ineffective assistance of counsel based on a defendant's rejection of a plea offer, the defendant must show that: (1) counsel failed to properly communicate the plea offer or misinformed defendant about the penalties he faced; (2) the defendant would have accepted the plea offer had he been properly informed; and (3) acceptance of the plea offer would have resulted in a lesser sentence. *Lewis v. State*, 751 So. 2d 715, 717 (Fla. 5th DCA 2000); *Eristma v. State*, 766 So. 2d 1095, 1096 (Fla. 2d DCA 2000). "A defendant is inherently prejudiced by his inability, due to his counsel's neglect, to make an informed decision whether to plea bargain." *Aebi v. State*, 842 So. 2d 888, 889 (Fla. 2d DCA 2003) (citing *Cottle v. State*, 733 So. 2d 963 (Fla. 1999))

Although an appellate court should defer to factual findings of the trial court on a motion for postconviction relief, the appellate court is free to substitute its own judgment to determine if those facts legally constitute a claim for ineffective assistance of counsel. *Demurjian v. State*, 727 So. 2d 324, 326 (Fla. 4th DCA 1999). Thus, on a claim of ineffective assistance of counsel, an appellate court reviews *de novo* a trial court's conclusions as to whether a counsel's performance was deficient and whether such performance prejudiced the defendant. *Thomas v. State*, 838 So. 2d 535, 538-39 (Fla. 2003); *Thomas v. State*, 811 So. 2d 707, 708 (Fla. 1st DCA 2002).

This case is controlled by the decisions of the district courts in *Eristma* and *Gant v. State*, 777 So. 2d 455 (Fla. 1st DCA 2001). In *Eristma*, the defendant was convicted of eight counts of sexual battery and sentenced to six consecutive life sentences and two consecutive 30-year sentences. Prior to trial, the defendant had allegedly turned down a plea offer from the state providing for a single 10-year sentence. In a motion for postconviction relief, the defendant alleged that defense counsel failed to properly communicate the state's plea offer because he never explained the pros and cons of going to trial, the strengths of the state's case, or the possible sentences that could be imposed if he was convicted at trial. The defendant further alleged that, had he been properly informed on these matters, he would have accepted the state's plea offer. The trial court summarily denied the defendant's motion. *Eristma*, 766 So. 2d at 1096-97

The district court concluded that the defendant had stated a valid claim of ineffective assistance of counsel. Accordingly, the district court reversed the trial court's decision and remanded the case for an evidentiary hearing. *Id.* at 1097; *See also Oliver v. State*, 691 So. 2d 1126 (Fla. 1st DCA 1997) (reversing summary denial where defendant alleged that he rejected plea offer because

trial counsel refused to allow him to review the state's evidence against him).

In *Gant*, the defendant was convicted of dealing in stolen property and sentence to 20 years in prison as a habitual felony offender. Prior to trial, the defendant had rejected the state's plea offer of 8 years in prison. In a motion for postconviction relief, the defendant alleged that he rejected the state's plea offer because trial counsel had failed to inform him that he faced enhanced sentencing as a habitual felony offender. Additionally, the defendant alleged that trial counsel had failed to inform him that the state had an incriminating pawn ticket and the testimony of the pawn shop owner to support the charge if it proceeded to trial. The defendant asserted that, had he known been properly informed of the penalty he faced and the strength of the state's case, he would have accepted the plea offer.

The district court concluded that the defendant had stated a valid claim of ineffective assistance of counsel. Accordingly, the district court reversed the trial court's summary denial of the defendant's motion and remanded the case to the trial court for an evidentiary hearing. *Gant*, 777 So. 2d at 455; *See also Garcia v. State*, 736 So. 2d 89 (Fla. 4th DCA 1999) (remanding case for evidentiary hearing in part because defendant alleged that trial counsel had failed to discus the strengths of the state's case with him prior to his rejection of a plea offer).

In the instant case, it is undisputed that, had Mr. Casler accepted the plea offered by the State, he would a sentence which was far lesser than the one that was actually imposed. Mr. Casler received a sentence of life in prison without the possibility of parole, and the state's plea offer was for a sentence between approximately 22.5 years and 37.5 years in prison. Therefore, it is undisputed that Mr. Frazier established the third prong of the test laid out in *Lewis* and *Eristma*.

The testimony at the evidentiary hearing also established that trial counsel never properly computed the sentencing guidelines range that would have applied had Mr. Casler accepted the state's plea offer. On May 11, 1998, just prior to the commencement of jury selection, trial counsel incorrectly told the trial court that the applicable guideline range if Mr. Casler accepted the state's plea offer was between 30 and 50 years in prison. The prosecutor corrected trial counsel and informed the court that 30 years was actually the middle of the applicable range, and thus, that the sentence would be between approximately 22.5 and 37.5 years. Therefore, because trial counsel did not know the actual terms of the plea offered by the state, there was no way he could have properly conveyed that offer to Mr. Casler.

Additionally, Mr. Casler testified that trial counsel never explained to him (1) the sentencing guidelines; (2) the possibility of earning gain time on the plea offered by the state; (3) that if he was convicted at trial he would be sentenced to life in prison without the possibility of parole; (4) the strengths and weaknesses of the state's case against him; (5) that pretrial discovery had no produced any evidence that would be helpful in impeaching the testimony of James Cook, the state's main witness; and (6) that if the jury believed Cook's testimony, they were likely to convict him of first degree murder.

Additionally, trial counsel stated that Mr. Casler was the most difficult client he had ever dealt with in terms of communication. This difficulty was even more reason for trial counsel to memorialize and explain both the plea offer, and the relevant facts affecting the decision to accept or deny that offer, to Mr. Casler in writing. Nonetheless, trial counsel failed to do so.

Mr. Casler specifically testified that, had he been properly informed of the aforementioned information, he would have accepted the state's plea offer. This testimony cannot be rebutted

because no one except Mr. Casler knows what he would have done had he been properly informed.

As previously asserted, "[a] defendant is inherently prejudiced by his inability, due to his counsel's neglect, to make an informed decision whether to plea bargain." *See Aebi, supra.* Based on that inherent prejudice, Mr. Casler urges this Court to adopt a per se rule, holding that all defendants that reject a plea offer based solely on trial counsel's neglect should be entitled to relief. A bright line rule on this issue would ensure that the prejudice resulting from trial counsel's deficiency would not be ignored and would provide trial courts with clear and easy guidelines to apply in these proceedings.

Moreover, the fact that Mr. Casler did not want to enter a plea and wanted to go to trial to prove his innocence does not defeat his claim. *See Lewis, supra* (vacating defendant's conviction despite fact that he had maintained his innocence and had refused to enter a plea). He had reached that decision based on the inadequate information provided to him by trial counsel. Mr. Casler specifically testified that, had he had been properly informed, he would have accepted the state's plea offer.

A postconviction proceeding brought pursuant to Fla. R. Crim. P. 3.850 is civil in nature. *Carter v. State*, 706 So. 2d 873, 875 (Fla. 1997). As such, a defendant seeking relief pursuant to Rule 3.850 must only establish his claim by a preponderance of the evidence.

Therefore, the facts and evidence presented at the evidentiary hearing clearly established that Mr. Casler was provided ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

Accordingly, the trial court erred in denying Mr. Casler's motion for postconviction relief. This Court should reverse that decision

and remand the case to the trial court for a new trial and good faith resumption of plea negotiations. *See Eristma*, 766 So. 2d at 1097; *Lewis*, 751 So. 2d at 718.

B. THE EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING ESTABLISHED THAT TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO BRING THE PERCEIVED INCOMPETENCY OF MR. CASLER TO THE ATTENTION OF THE TRIAL COURT.

The testimony of trial counsel at the evidentiary hearing established that counsel was also ineffective for failing to bring the perceived incompetency of Mr. Casler to the attention of the trial court. This issue was raised below in Mr. Casler's written closing argument. (R7-1290).

At the hearing, trial counsel testified that, on the day he relayed the plea offer to Mr. Casler, he believed that Mr. Casler was not competent to understand the ramifications of that offer. (RS at 1431-32).

Since a finding of incompetency precludes the state from seeking a conviction, the failure to take action to determine a defendant's competency constitutes ineffective assistance of counsel where there is evidence to support the defendant's incompetency. *Broomfield v. State*, 788 So. 2d 1043 (Fla. 2d DCA 2001); *See also Powell v. State*, 464 So. 2d 1319 (Fla. 1st DCA 1985).

The fact that trial counsel previously sought to have Mr. Casler declared incompetent did not relieve him of the duty to bring the issue to attention of the trial court at a later time. Pursuant to Fla. R. Crim. P. 3.210, trial counsel had a continuing duty to bring

forth the issue of Mr. Casler's competence at any critical stage of the proceedings.

In *Cottle v. State*, 733 So. 2d 963 (Fla. 1999), the Florida Supreme specifically held that the process in which a defendant determines whether to accept a plea offer is such a critical stage. Therefore, Mr. Casler was provided ineffective assistance of counsel when trial counsel, despite his belief that Mr. Casler was not competent to understand the ramifications of the state's plea offer, failed to bring that issue to the attention of the trial court as required by Rule 3.210. This Court should reverse his conviction, remand the case to the trial court for a new trial, and order further investigation into the competency of Mr. Casler to stand trial.

II THE TRIAL COURT ERRED IN SUMMARILY DENYING CLAIMS 1-9 AND 11-12 OF MR. CASLER'S MOTION FOR POSTCONVICTION RELIEF

In order to establish a valid claim of ineffective assistance of trial counsel, a defendant must establish (1) that trial counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. *State v. Coney,* 845 So. 2d 120, 127 (Fla. 2003) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). In order to establish prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 128 n.9; *Hugh v. State*, 826 So. 2d 1103 (Fla. 5th DCA 2002). In order to establish such a reasonable probability, the defendant must only show a probability sufficient to undermine confidence in the outcome, not that counsel's error definitely altered the outcome of the trial. *McLin v. State,* 827 So. 2d 948, 958 (Fla. 2002).

On a claim of ineffective assistance of counsel, an appellate court reviews *de novo* a trial court's conclusions as to whether a

counsel's performance was deficient and whether such performance prejudiced the defendant. *Thomas v. State*, 838 So. 2d 535, 538-39 (Fla. 2003); *Thomas v. State*, 811 So. 2d 707, 708 (Fla. 1st DCA 2002).

In order to properly support a summary denial of a motion for post-conviction relief, a trial court must either state its rationale in its decision or attach specific portions of the record that conclusively refute each claim presented in the motion. *McLin*, 827 So. 2d at 954. Additionally, a trial court's summary denial of claims raised in a motion for postconviction relief can only be affirmed on appeal if the claims are facially invalid or are conclusively refuted by the record. *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999); Fla. R. Crim. P. 3.850(d). Where the trial court does not conduct an evidentiary hearing on an issue, the appellate court must accept the defendant's factual allegations unless they are specifically refuted by the record. *Peede*, 748 So. 2d at 257; *Crumite v. State*, 842 So. 2d 271, 273 (Fla. 1st DCA 2003).

The trial court erred in summarily denying 11 of the 12 claims Mr. Casler raised in his motion for postconviction relief. Neither the rationale nor the record attachments provided by the trial court in support of its summary denial conclusively refute Mr. Casler's claims.

A. MR. CASLER WS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL FAILED TO ADEQUATELY PREPARE BOTH MR. CASLER AND DR. GLENN CADDY TO TESTIFY WITHOUT OPENING THE DOOR TO EXTREMELY PREJUDICIAL INFORMATION CONCERNING MR.

CASLER'S INCIDENTS OF VIOLENCE AGAINST LINDA BRAY.

This argument relates to Issues 1-3 and 11 raised in Mr. Casler's motion for postconviction relief and denied by the trial court. Mr. Casler's trial counsel was ineffective because he failed to adequately prepare both Mr. Casler and Dr. Glenn Caddy to testify without opening the door to extremely prejudicial evidence concerning Mr. Casler's prior violence with Linda Bray. This is a facially valid claim which requires an evidentiary hearing. *Gudinas v. State*, 816 So. 2d 1095, 1110 (Fla. 2002) (claim that trial counsel erred in opening door to prior incident of sexual assault denied after trial court held an evidentiary hearing); *Valle v. State*, 778 So. 2d 960, 966-67 (Fla. 2001) (trial counsel's action in opening door to prison misconduct of defendant not ineffective based on evidence presented at evidentiary hearing); *Johnson v. State*, 769 So. 2d 990, 1000-01 (Fla. 2000) (testimony presented at evidentiary hearing established that trial counsel was not ineffective for opening the door to damaging evidence). Mr. Casler was severely prejudiced by trial counsel's error because it permitted normally inadmissible propensity evidence to be admitted at trial. In absence of testimony from Ms. Casler and Dr. Caddy which opened the door, Mr. Casler's prior violent conduct against his former girlfriend Linda Bray would have been inadmissible because it did not result in a conviction. See Fla. Stat. § 90.610. Such evidence would be irrelevant as evidence showing that Mr. Casler had a propensity for violence against women.

Due to trial counsel's failure to properly prepare Mr. Casler for trial, Mr. Casler basically testified on direct examination that he had never hit a woman. (R2-381). This testimony opened the door to cross-examination of Mr. Casler about his prior violence against Linda Bray. (R3-406). The evidence brought out on cross-examination was severely prejudicial because it was

evidence of a propensity for violence and damaged Mr. Casler's credibility.

Likewise, Mr. Casler's denial of violence against Linda Bray on cross-examination permitted the state to call her as a rebuttal witness. Ms. Bray testified that, during and after her romantic relationship with Mr. Casler, Mr. Casler had physically struck her on more than one occasion. (R4 at 657-58).

Additionally, based on trial counsel's failure to adequately prepare Dr. Caddy for his testimony, he testified that Mr. Casler did not have a substantial history of violence. (R3-504). This testimony opened the door to the state cross-examining Dr. Caddy about his knowledge of Mr. Casler's violence toward Linda Bray. (R3 at 505-507, 540-549). The state used Dr. Caddy's apparent lack of knowledge of this incident (due to trial counsel's failure to provide him with such knowledge) to impeach his credibility. Dr. Caddy was a key witness at Mr. Casler's trial because his expert testimony was the foundation of Mr. Casler's insanity and voluntary intoxication defenses.

Finally, in closing argument, the State argued that Dr. Caddy had not been provided a complete picture of Mr. Casler's criminal history by trial counsel prior to reaching a conclusion that Mr. Casler lacked a significant history of violence. (R5 at 792-93). This argument was highly prejudicial to Mr. Casler because it hurt the credibility of both Dr. Caddy and trial counsel. Once again, the state could only make this argument because trial counsel failed to adequately prepare Dr. Caddy to testify without opening the door to the Linda Bray incident.

Based on the foregoing, there is a reasonable probability that, but for trial counsel's failure to adequately prepare Mr. Casler and Dr. Caddy to testify, Mr. Casler would not have been convicted of first degree murder. The trial court's extremely limited reasoning

and the record attachments provided in support of its summary denial of these four claims (1-3, 11) do not conclusively refute the merit of those claims. Accordingly, the trial court erred in summarily denying relief on Issues 1-3 and 11. This Court should reverse that decision and remand the case to the trial court for an evidentiary hearing on those issues.

B. MR. CASLER WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL WRONGFULLY RECOMMENDED THAT HE TESTIFY AT TRIAL.

Trial counsel was ineffective for recommending that Mr. Casler testify at trial. Mr. Casler's testimony was of extremely limited probative value due to both his mental condition and his lack of memory of the incident in question.

The evidence presented at trial illustrated that Mr. Casler is afflicted by profound brain damage and underlying mental illness, and that his competence to stand to trial was marginal at best. As evidenced by his testimony, Mr. Casler had an inability to focus, think clearly, and process information. These inabilities made Ms. Casler extremely susceptible to successful cross-examination by the state. (R2 at 325-383; R3 at 406-450). In fact, as previously discussed, these inabilities made it extremely likely that Mr. Casler could inadvertently open the door to evidence of his violent behavior towards Linda Bray.

Therefore, trial counsel's recommendation that Mr. Casler testify at trial constituted ineffective assistance of counsel and prejudiced Mr. Casler. The limited reasoning provided by the trial court for its summary denial of this claim does not conclusively refute its merit. There was testimony from several other witnesses, including Dr. Caddy, that established Mr. Casler's defenses.

Accordingly, this Court should reverse the trial court's decision and remand the case for an evidentiary hearing on this issue.

C. MR. CASLER WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL FAILED TO OBJECT TO HIGHLY-INFLAMMATORY QUESTIONS PROPOUNDED BY THE STATE DURING ITS CROSS-EXAMINATION OF DR. CADDY.

During its cross-examination of Dr. Caddy, the state asked several questions which improperly made it appear that Mr. Casler had an extremely violent history and that Dr. Caddy had knowingly ignored that history in reaching his conclusions and opinions. (R3 at 505-507, 540-549). Trial counsel's failure to object to these improper questions was both ineffective and highly prejudicial to Mr. Casler, because it allowed the state to go unchecked in its effort to make the jury believe Mr. Casler had an extremely violent criminal history. Additionally, it allowed the state to challenge the credibility of both trial counsel and Dr. Caddy by suggesting that they were hiding information from the jury. Finally, trial counsel's failure to object to these improper questions allowed the state to argue in closing statements that Dr. Caddy had not been provided a complete picture of Mr. Casler's criminal history by trial counsel prior to reaching a conclusion that Mr. Casler lacked a significant history of violence. (R5 at 792-93).

The trial court's short explanation for its decision to summarily deny this claim simply does not clearly refute its merits. Accordingly, this Court should remand this case for an evidentiary hearing on this issue.

D. MR. CASLER WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL FAILED TO OBJECT TO THE STATE'S INCOMPLETE AND MISLEADING EXPLANATION OF THE PREMEDITATION NECESSARY FOR A CONVICTION OF FIRST DEGREE MURDER.

Mr. Casler was provided ineffective assistance of counsel by trial counsel's failure to object to the prosecutor's repeated incomplete and misleading explanation of premeditation during closing argument. Trial counsel's action was both deficient and highly prejudicial to Mr. Casler.

Premeditation is defined as follows:

> more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.

Coolen v. State, 690 So. 2d 738, 741 (Fla. 1997) (emphasis added); *See also Evans v. State*, 838 So. 2d 1090, 1095 (Fla. 2002); Fla. Std. Jury Instr. (Crim.) 7.2.

This case is directly controlled by this Court's decision in *Waters v. State*, 486 So. 2d 614 (Fla. 5th DCA 1986). In *Waters*, during jury selection, the prosecutor defined premeditation as "killing after consciously deciding to do so" and "operation of the mind." The prosecutor failed to include "reflection," which is an integral second requirement for premeditation. This Court held that the trial court erred in permitting the prosecutor to define premeditation in this manner because it allowed the improper

definition to form in the jury's mind. This Court reversed the defendant's conviction and remanded for a new trial.

This Court's opinion in *Waters* makes no mention of the instruction on premeditation the trial court provided the jury at the close of the case. Based on this lack of discussion, Mr. Casler assumes that the trial court properly defined premeditation, but that this Court concluded that the trial court's action did not cure the error caused by the prosecutor.

As in *Waters*, the prosecutor in the instant case on two separate occasions provided the jury with an incomplete and misleading definition of premeditation by failing to include the element of reflection. First, the prosecutor, in explaining premeditation, stated that "[a]ll we have to prove to you beyond a reasonable doubt is that when he killed her, that in his mind at that moment was a decision that he wanted her to be dead. That's all." (R4-741) (emphasis added). The prosecutor further stated that "[i]f you are convinced beyond a reasonable doubt that when he wrapped that ligature around her neck and squeezed it, he did so because he had decided he wanted her dead, then we have met our burden. That's all we have to do." (R5-742) (emphasis added).

Both of these statements failed to include the element of reflection necessary to establish premeditation. At the end of each statement, the prosecutor stated that the description he had just provided was all that he was required to prove. Therefore, the prosecutor provided the jury with two different incomplete and misleading descriptions of premeditation.

As in *Waters*, an improper definition of premeditation was allowed to form in the jury's mind. The sole difference between a conviction of first degree murder (life sentence without possibility of parole) and conviction of second degree murder (determinate sentence) was the jury's determination that the

killing was premeditated. Accordingly, this Court, as it did in *Waters*, should reverse Ms. Casler's conviction and remand the case for a new trial.

There is a reasonable probability that, in absence of the state's improper descriptions of the issue of premeditation, Mr. Casler would not have been convicted of first degree murder. The improper definition provided to the jury clearly undermines confidence in the jury's verdict. Accordingly, trial counsel's failure to object to this improper definition was both deficient and highly prejudicial.

The trial court's conclusion that "Defendant suffered no prejudice from any inaccurate statement of the law the prosecutor may have made" is simply insufficient to refute the merit of this claim. Additionally, the fact that the prosecutor told the jury that he may misstate the law does not actually allow him to do so, especially on an issue as crucial as premeditation. Likewise, the fact that the jury was properly instructed by the trial court does not cure the error. The incorrect definition of premeditation was allowed to form in the jury's mind. *See Waters*, *supra*. Accordingly, this Court should reverse the trial court's decision and remand the case for a new trial or an evidentiary hearing on this issue.

E. MR. CASLER WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL FAILED TO SEEK SUPPRESSION OF THE ORAL, TAPED, AND WRITTEN STATEMENTS OBTAINED FROM MR. CASLER BY LAW ENFORCEMENT SHORTLY AFTER HIS ARREST, AND INTRODUCED THOSE STATEMENTS INTO EVIDENCE AT TRIAL.

Both trial counsel's failure to seek the suppression of Mr. Casler's statements, and his action in introducing those statements into evidence at trial constituted ineffective assistance of counsel. Trial counsel's actions were both deficient and highly prejudicial to Mr. Casler.

Clearly, any confession or statement on the part of a defendant must be voluntary before it is admissible at trial. Such a confession may be inadmissible as involuntary where it is given while a defendant is under the influence of alcohol or narcotics. *Cox v. State*, 711 So. 2d 1323 (Fla. 5th DCA 1998) (confession only voluntary where defendant is able to comprehend what he is doing and to communicate with coherence and rationality).

In the instant case, both the circumstances surrounding Mr. Casler's statements and the content of the statements themselves illustrate that they may have not been voluntary. (R4 at 635, 637-644, 645). There was substantial evidence that Mr. Casler was highly intoxicated and suffering from mental illness at the time he provided those statements. Based on those facts, trial counsel had a good chance at getting those statements suppressed by the trial court, but chose not to do so. Instead, trial counsel introduced those statements in the defense case in chief.

Mr. Casler's statements, introduced by trial counsel through Detective Julius Gause, were highly prejudicial because (1) they corroborated the testimony of James Cook, the individual who discovered Mr. Casler with the dead body of the victim; (2) they provided the jury with the motive advanced by the state; that Mr. Casler committed the crime because the victim was seeing a younger man with a big penis; and (3) contradicted the testimony of Dr. Caddy, suggesting that Ms. Casler may not have been in an "alcoholic blackout" at the time of the offense.

This is a facially valid claim which requires an evidentiary hearing. *See Arbelaez v. State*, 775 So. 2d 909, 921 (Fla. 2000) (Quince, J. concurring/dissenting) (evidentiary hearing required on trial counsel's failure to seek pretrial suppression of defendant's statements on ground that they were involuntary); *Lambert v. State*, 811 So. 2d 805 (Fla. 2d DCA 2002) (failure to seek to exclude evidence of alleged new law violation at defendant's probation revocation hearing constitute ineffective assistance of counsel); *See also Maharaj v. State*, 778 So. 2d 944, 958 (Fla. 2000) (failure to file pretrial motion to suppress not ineffective based on testimony of defense counsel at evidentiary hearing).

This case is directly controlled by *Branham v. State*, 846 So. 2d 616 (Fla. 2d DCA 2003). In *Branham*, the defendant claimed that his trial counsel was ineffective for failing to move to suppress his confession when counsel knew that it was obtained through threats and coercion. The trial court summarily denied his motion, attaching a transcript of the defendant's confession to its order.

The district court reversed the trial court's summary denial and remanded the case for an evidentiary hearing, holding that the claim was not conclusively refuted by the transcript of the confession. The district court reasoned that, if trial counsel had filed a motion to suppress, the trial court would have been required to make a determination on whether the confession at issue was the result of impermissible coercion. *Branham*, 846 So. 2d at 617.

As in *Branham*, the rationale provided by the trial court in this case is insufficient to support its summary denial of Mr. Casler's claim. First, despite the trial court's conclusion to the contrary, the reason trial counsel did not seek pretrial suppression and introduced Mr. Casler's statements into evidence does not appear

in the record. Even if trial counsel introduced the statements in order to bolster Mr. Casler's defenses, such a strategy cannot be considered reasonable when the statements also corroborate the testimony of the state's main witness and provide the jury with a motive for the charged offense.

Therefore, the trial court's conclusion that trial counsel reasonably used the statements by introducing them at trial is clearly not supported the record. It is clear, that in absence of Mr. Casler's statements, there is a reasonable probability that he would not have been convicted of first degree murder.

As such, trial counsel's failure to seek the suppression of those statements, and the introduction of those statements into evidence constitutes ineffective assistance of counsel. This Court should reverse the decision of the trial court and remand the case for an evidentiary hearing.

F. MR. CASLER WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL FAILED TO HAVE DNA TESTING CONDUCTED ON THE VICTIM'S FINGERNAIL SCRAPINGS AND FAILED TO HAVE LABORATORY TESTING DONE ON VAGINAL SWABS TAKEN FROM THE VICTIM.

Despite the trial court's conclusion to the contrary, this claim is not merely speculative, but points out a reasonable course of action that trial counsel should have taken in order to adequately represent Mr. Casler. The reasoning provided by the trial court for its summary denial of this claim does not conclusively refute its merit. Accordingly, this Court should reverse the decision of the trial court and remand the case for an evidentiary hearing on this issue.

G. THE CUMULATIVE ERROR OF TRIAL COUNSEL IN THIS CASE REQUIRES THAT MR. CASLER BE PROVIDED WITH POSTCONVICTION RELIEF.

The cumulative effect of all the errors of trial counsel discussed above entitle Mr. Casler to relief. *See Trepal v. State*, 846 So. 2d 405, 426 (Fla. 2003). This Court should grant his motion and remand the case for a new trial or an evidentiary hearing.

CONCLUSION

This Court should reverse the trial court's order denying Mr. Casler's motion for postconviction relief. Mr. Casler established that he was provided ineffective assistance of counsel at the evidentiary hearing below. He rejected the State's plea offer solely because his trial counsel provided him with woefully inadequate information about the plea offer and the strengths and weaknesses of the state's case against him. Had he been properly informed, Mr. Casler would have accepted the state's plea offer. The sentence that Mr. Casler would have received had he accepted the state's plea offer would have been far less than the sentence of life in prison without the possibility of parole that was actually imposed.

Likewise, trial counsel was ineffective for failing to bring forth the fact that he believed Mr. Casler was incompetent to understand the state's plea offer at the time he attempted to convey it.

Therefore, the trial court erred in denying Mr. Casler's motion for postconviction relief. This Court should reverse that decision, and remand the case for a new trial and good faith resumption of plea negotiations.

Additionally, Mr. Casler also asserted 11 other valid claims of ineffective assistance of counsel in his motion for postconviction relief. The trial court erred in summarily denying each of those claims because neither the reasoning nor the record attachments provided by the trial court conclusively refuted the merit of those claims. Accordingly, this Court should reverse the decision of the trial court and remand the case for an evidentiary hearing on each of those 11 issues.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief is submitted in Courier New 12-point font and thereby complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

s/William R. Ponall 421634 for
WARREN W. LINDSEY
KIRKCONNELL, LINDSEY, SNURE AND YATES, P.A.
1150 Louisiana Avenue, Suite 1
P.O. Box 2728
Winter Park, FL 32790-2728
Telephone: (407) 644-7600
Facsimile: (407) 645-0805
Florida Bar No. 299111

s/William R. Ponall
WILLIAM R. PONALL
KIRKCONNELL, LINDSEY, SNURE AND YATES, P.A.
1150 Louisiana Ave., Suite 1
P.O. Box 2728
Winter Park, FL 32790-2728
Telephone: (407) 644-7600
Facsimile: (407) 645-0805
Florida Bar No. 421634

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this Initial Brief was provided by mail delivery to Judy Rush, Assistant Attorney General, 444 Seabreeze Blvd., Suite 500, Daytona Beach, FL 32118, on this 21st day of July, 2003.

s/William R. Ponall 421634 for
WARREN W. LINDSEY
KIRKCONNELL, LINDSEY, SNURE AND YATES, P.A.
1150 Louisiana Avenue, Suite 1
P.O. Box 2728
Winter Park, FL 32790-2728
Telephone: (407) 644-7600
Facsimile: (407) 645-0805
Florida Bar No. 299111

s/William R. Ponall
WILLIAM R. PONALL
KIRKCONNELL, LINDSEY, SNURE AND YATES, P.A.
1150 Louisiana Ave., Suite 1
P.O. Box 2728
Winter Park, FL 32790-2728
Telephone: (407) 644-7600
Facsimile: (407) 645-0805
Florida Bar No. 421634

ATTORNEYS FOR APPELLANT

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR, ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff, CASE NO.: CR96-13147

vs.

CRAIG AVERY CASLER,

Defendant.
_____/

ORDER DENYING MOTION FOR POSTCONVICTION RELIEF

THIS MATTER came before the Court for consideration of Defendant Craig Avery Casler's Motion for Postconviction Relief, filed August 21, 2001, pursuant to Florida Rule of Criminal Procedure 3.850. The State filed a Response. An evidentiary hearing was held on August 3, 2002, addressing claim (10). Having reviewed the Motion, Response, file and record of this case, carefully considered the testimony and argument at the evidentiary hearing, the Court concludes that the Motion must be denied.

On May 15, 1998, Defendant was convicted after a jury trial of first degree murder an sentenced to life in prison. On direct appeal, his conviction and sentence were per curiam affirmed. This timely motion follows. Defendant argues twelve claims of ineffective assistance of counsel.

In claim (1), Defendant argues that trial counsel was ineffective in his handling of Defendant's alleged prior bad act, the "Linda Bray assault incident," because evidence of the incident would have been inadmissible but for counsel's actions. He contends that because counsel never instructed Defendant on how to testify properly, Defendant gave expansive direct examination testimony, including the statement that he had "never hit a woman." Although counsel could have instructed Defendant "to focus his testimony on the charged offense," counsel was under no duty to instruct Defendant not to lie on the stand. Moreover, any failure by counsel to inform Defendant of his obligation to tell the truth was cured when Defendant stood before the court and swore an oath to do so. Accordingly, Defendant "opened the door," not counsel.

In claim (2), Defendant contends that counsel was ineffective for failing to adequately prepare Dr. Caddy to give trial testimony so he wouldn't inadvertently "open the door" about the Linda Bray incident. Dr. Caddy testified on direct examination that "this man does not have a substantial history of violence." (See attached TT, P. 412). On cross examination, the State then asked him if he was aware of the Linda Bray incident. (Pp. 443-445). First, Defendant concedes and the record reflects that Dr. Caddy was informed of the Linda Bray incidentby defense counsel, and took that information into consideration in formulating his opinion. (See attached TT, Pp. 460, 462, 467). Moreover, the trial court limited the State's questioning of Dr. Caddy to what he remembered being told about th prior incident, after counsel vehemently and successfully argued that the State was asking improper questions. (Pp. 445-452, 466). Any further argument regarding the admissibility of this evidence was properly preserved and should have been raised on direct appeal.

In claim (3), Defendant makes substantially the same allegations as in claim (1). For the reasons stated above, the Court finds that

counsel need not have given Defendant any further instruction. Hence, no relief is warranted.

Next, in claim (4), Defendant alleges that counsel was ineffective for recommending that Defendant take the stand to testify. Defendant's testimony was essential to his defenses of insanity and voluntary intoxication because there were no witnesses who could testify to Defendant's mental state and sobriety at the time of the murder. Thus, Defendant's testimony was the only evidene which supported counsel's request for jury instructions on these defenses.

In claim (5), Defendant contends that counsel was ineffective for failing to object when the prosecutor cross-examined Dr. Caddy with questions improperly suggesting that Defendant had an extensive violent criminal history; suggesting that Dr. Caddy had been remiss in not obtaining an accurate picture of Defendant's violent history. As discussed above in claim (2), counsel did, in fact, object to the State's questioning of Dr. Caddy. Accordingly, these arguments should have been raised on direct appeal. In addition, the State points out that these allegations were included in Point V of Defendant's Initial Brief on appeal.

In claim (6), Defendant avers that counsel was ineffective for failing to objet to that part of the State's closing argument which gave an incomplete, misleading explanation of what it means to premeditate first degree murder. The Court concludes that Defendant suffered no prejudice from any inaccurate statement of the law the prosecutor may have made. At the beginning of his closing argument, the prosecutor told the jury that although he and the defense attorney may be referring to the jury instructions, the judge would read the jury instructions and give them a written copy for deliberations. (See attached TT, P. 675). In fact, during his own closing argument, defense counsel stated:

> The court's job, which we have alluded to throughout this case, is to instruct you on the law that would be applied to the facts of this case....I also caution you this. It is the type of situation where we may misstate the law. The law is what you are going to get in writing , the instructions. (See TT, Pp. 685-686).

Hence, no prejudice ensued from any misstatement of the law the prosecutor may have made.

In claim (7), Defendant alleges that counsel was ineffective for failing to seek suppression of the oral, taped, and written statements obtained from Defendant by law enforcement within a few hours of his arrest, and further ineffective in introducing these statements and related testimony into evidence during the defense case-in-chief. Defendant alleges that his statements were involuntary because he "was both very impaired by alcohol and in a very disturbed mental state." (Defendant's Motion, P. 22). The same reasons Defendant claims his statements were involuntary support counsel's presentation of the statements. Trial counsel's introduction of Defendant's statements, and related testimony, were clearly intended to bolster Defendant's insanity and voluntary intoxication defenses. As discussed above, there was very little evidence available to establish these defenses, and this Court concludes that counsel reasonably used the statements.

Next, in claim (8), Defendant argues that counsel was ineffective for not seeking to have DNA testing done on fingernail scrapings and vaginal swabs obtained from the body of the victim. The Court finds these allegations to be conclusory and merely speculative. Defendant alleges only that the DNA evidence *might* have excluded him. However, even if the jury had heard that the DNA evidence excluded Defendant, this Court concludes there is no reasonable probability that Defendant would have been acquitted. Simply, such speculation does not warrant

postconviction relief. *See LeCroy v. Dugger*, 727 So.2d 236, 238 (Fla. 1999).

In claim (9), Defendant contends that counsel was ineffective when he made comments in closing argument which Defendant alleges were not supported by the evidence. A review of the medical examiner's testimony reveals testimony from which counsel could have reasonably argued that the victim might have been beaten elsewhere, returned to Defendant's apartment, and then died. (See attached TT, Pp. 223-224). The medical examiner's testimony also provided a basis for counsel to reasonably argue that something was pulled off the victim's neck. (See attached TT, Pp. 212-213). Thus, counsel's closing arguments were reasonable.

Claim (10) was addressed at the evidentiary hearing. Defendant alleged that counsel rendered ineffective assistance by communicating the state's plea offer to him in an informational vacuum. At the hearing , Defendant admitted that he had periods of memory lapses prior to trial. He also admitted that defense counsel told him twice that the state had offered a plea, but that he wanted to go to trial to prove he was innocent. Counsel stated that he explained to Defendant that the possible maximum penalty was life without parole. He also stated that Defendant consistently maintained that he couldn't have done this, and did not want to accept a plea. After carefully considering all the testimony, the Court concludes that Defendant was adequately informed of the plea offers and the surrounding circumstances, and decided to pursue his case at trial.

In claim (11), Defendant again alleges that counsel was ineffective for putting Defendant on the stand without having prepared him to be a witness. These allegations merely mirror those in claims (1) and (3). Therefore, the Court again denied relief.

Finally, in claim (12), Defendant argues that viewed cumulatively, counsel's errors and omissions identified throughout his motion justify relief. In light of the Court's holdings throughout this Order, the Court concludes that even viewed cumulatively, Defendant's allegations do not warrant relief.

Therefore, it is hereby ORDERED AND ADJUDGED that:

1. Defendant's Motion is DENIED.

2. Defendant is advised that if he wishes to appeal, he must do so in writing, within thirty (30) days from the date of this Order.

3. The Clerk of Court shall promptly serve a copy of this Order upon Defendant including an appropriate certificate of service.

DONE AND ORDERED, in Chambers, at Orlando, Orange County, Florida, this 18th day of December, 2002.

s/Belvin Perry Jr.
BELVIN PERRY, R.
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered via U.S. Mail or hand delivery to: Chris Lerner, Office of the State Attorney, 415 N. Orange Avenue, Orlando, FL 32801; and to Warren W. Lindsey, Kirkconnell, Lindsey, Snure and Yates, 1150 Louisiana Avenue, Suite 1, Winter Park, FL 32789, this 18th day of December, 2002.

s/Jill Gay
Judicial Assistant

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO. CR96-13147

STATE OF FLORIDA,

Plaintiff,

vs.

CRAIG AVERY CASLER,

Defendant.
_____/

FINAL ARGUMENT AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR POST-CONVICTION RELIEF

In the Order granting an evidentiary hearing on the Defendant's Motion for Post-Conviction Relief Pursuant to Florida Rule of Criminal Procedure 3.850, the Court limited the issue to be considered at the evidentiary hearing as to whether Mr. Casler's defense counsel, F. WESLEY ("Buck") BLANKNER, JR., was ineffective by "communicating the State's plea offer to Defendant in an informational vacuum". The evidentiary hearing held before the Court on Friday, August 30, 2002, clearly demonstrated that Mr. Blankner communicated the State's plea offer in an informational vacuum in this case.

Mr. Casler was charged with the October 1996 first-degree murder of Judith Johnson. Mr. Casler remained incarcerated in the

Orange County Jail from his arrest in October 1996 through his trial, which commenced with jury selection on May 11, 1998, and concluded with the jury finding him 'guilty' of first-degree murder and him being sentenced to life imprisonment, without parole, on Friday, May 15, 1998.

Mr. Casler testified that Mr. Blankner came to him with a plea offer from the State of second-degree murder on the morning of Tuesday, May 12, 1998, prior to the commencement of opening statements in the case. Mr. Casler testified that he was in a holding cell at the Orange County Courthouse when Mr. Blankner conveyed the plea offer to him. Mr. Casler testified that Mr. Blankner said he would receive about 22 years in prison. Mr. Casler said that Mr. Blankner never discussed the sentencing guidelines with him and never mentioned anything about sentencing guideline ranges. Mr. Casler testified that at no time during the case did Mr. Blankner explain to him that if he were convicted as charged of first-degree murder that he would be sentenced to life imprisonment without any possibility of parole. He further testified that Mr. Blankner did not spend very much time with him pre-trial and did not explain to him the strengths and weaknesses of the case nor did he ever make a plea recommendation to him. Mr. Casler testified that Mr. Blankner did not discuss the fact that pre-trial discovery had not produced any significant evidence to impeach the credibility of the State's main witness, James Cook, nor that if the jury believed Mr. Cook's testimony, Mr. Casler would probably be convicted of first-degree murder. He testified that Mr. Blankner did not communicate with him frequently or in any detail about the case. He testified that had Mr. Blankner explained to him about the strengths and weaknesses of the State's case, advised him of the sentencing matters, advised him of other matters relating to discovery and Mr. Cook, he definitely would have accepted the State's plea offer to second-degree murder. He also testified that Mr. Blankner never explained to him anything about gain time.

He also testified that Mr. Blankner never talked to him about any plea to manslaughter, even though the transcript of the trial at pages 8-11 show that Mr. Blankner offered to plead Mr. Casler to manslaughter. The entire discussion of the plea offer between Mr. Blankner and Mr. Casler was very short.

Attorney Blankner testified at the evidentiary hearing that a plea offer was conveyed by Assistant State Attorney Jeffrey Ashton on behalf of the State to second-degree murder sometime prior to the trial. Although Mr. Blankner's testimony at the hearing was vague as to the precise terms of the plea offer, it appears that according to him, the plea offer was to plead to second-degree murder and for Mr. Casler to be sentenced pursuant to sentencing guidelines in effect at the time. Mr. Blankner testified that he had no office notes or any written documents or memoranda of any kind memorializing the plea offer made or of any discussions which he may have had with Mr. Casler about the plea offer. He testified that he had no idea what the sentencing guidelines range would have been for Mr. Casler and that he did not have in his files any rough drafts or sentencing guidelines work sheet where he computed the sentencing guidelines range. He did acknowledge that on the morning prior to the commencement of jury selection on May 11, 1998, there was discussion on the record (see transcript pages 8-11) where he told the Court that the sentencing guidelines range was 30 to 50 years. He was corrected by the prosecutor, Jeff Ashton, who indicated that, in fact, 30 years was the mid-range of the sentencing guidelines; so the range would be 25 percent above or below that, which would be approximately 22.5 years to approximately 37.5 years. In any event, it was unrefuted that Mr. Blankner did not know the correct sentencing guidelines range and so would be unable to properly and correctly convey to Mr. Casler any intelligible plea offer.

Mr. Blankner testified that in his 25 years of practice, that Mr. Casler was the most difficult client he ever had to communicate

with. Further, Mr. Blankner testified that he felt that the day he relayed the plea offer to Mr. Casler, that Mr. Casler was mentally incompetent pursuant to Florida law to understand the plea offer. Mr. Blankner's testimony at the evidentiary hearing was uncontroverted on two material points: 1) that he never knew or properly computed what the sentencing guideline range was for second-degree murder and so could not have possibly properly relayed the plea offer to Mr. Casler for this reason alone; and 2) that he felt in his mind without question that Mr. Casler was mentally incompetent under Florida law to have understood the plea offer that he was relating to him in any event and that, in fact, Mr. Casler did not understand what he told him about the plea offer. Other excerpts from the transcript of trial demonstrate the communication problems between attorney Blankner and Mr. Casler. For example, at page 113 of the transcript during jury selection, Mr. Blankner advises the Court after an inquiry as to whether or not Mr. Blankner desires to consult with his client concerning jury selection: "No, that would be an absolute waste of time. Thank you." (See lines 23-24 at page 113.) Later in the trial, attorney Blankner actually tells his client, "Stop. Shut up right now. Got me?" (See lines 20-24, page 331.)

Mr. Blankner testified that he also discussed the plea offer with Mr. Casler's mother, Ellen Jarvis. Mrs. Jarvis testified at the hearing that Mr. Blankner never discussed any plea offers with her. Again, Mr. Blankner could point to no written notes in his file nor any communication or written memorialization of any kind concerning any plea discussions that he allegedly had with either Mrs. Jarvis or with Mr. Casler.

ARGUMENT

I. THAT ATTORNEY BLANKNER WAS DEFICIENT BY COMMUNICATING A PLEA OFFER TO MR. CASLER IN AN INFORMATIONAL VACUUM.

In a claim arising out of counsel's failure to inform a defendant of a plea offer, the defendant must show:

(1) counsel failed to communicate a plea offer or misinformed Defendant concerning the offer or other material aspects of the plea offer;

(2) the Defendant would have accepted the plea offer but for the inadequate notice and explanation; and

(3) acceptance of the State's plea offer would have resulted in a lesser sentence. Cottle v. State, 733 So.2d 963 (Fla. 1999). In Strickland v. Washington, 466 U.S. 668 (1984), the U.S. Supreme Court held that claimants must show both a deficient performance by counsel and subsequent prejudice resulting from that deficiency to merit relief for a claim of ineffective assistance of counsel. As stated in Cottle v. State, *supra* at 965:

> This analysis extends to challenges arising out of the plea process as a critical stage in criminal adjudication, which warrants the same constitutional guarantee of effective assistance as trial proceedings.

In Cottle, the Florida Supreme Court cited to American Bar Association (ABA) Standards that require defense attorneys to "promptly communicate and explain to the accused all significant plea proposals made by the prosecutor".

Florida Rule of Criminal Procedure 3.171(c)(2) further provides:

(2) Defense counsel shall advise Defendant of:
  (A) all plea offers; and
  (B) all pertinent matters bearing on the choice of which plea to enter and

> the particulars attendant upon each plea and the likely results thereof, as well as any possible alternatives that may be open to the defendant.

A defendant must be apprised of all material information concerning the content of a plea offer; otherwise, the plea offer is made in an informational vacuum, as clearly occurred in the instant case. For example, in Ginwright v. State, 466 So.2d 409 (Fla. 2d DCA 1985), the Court held that a defendant was entitled to an evidentiary hearing on the issue as to whether or not he was denied sufficient information and opportunity to make a voluntary and informed rejection of a plea bargain offer. The Court held in Ginwright that the defendant was entitled to an evidentiary hearing, stating:

> Appellant further alleged that his attorney never explained the consequences of this possible plea nor took the necessary time to allow him (appellant) to make this decision. In effect, appellant claims that counsel denied him the information and opportunity to make a voluntary and informed rejection of a plea bargain offer. Appellant's allegations, if true, may be found by a trier of fact to constitute a substantial omission by defense counsel.

A defendant must be advised by his defense counsel in evaluating a plea offer as to the penalty he faces and the strength of the State's case. Gant v. State, 777 So.2d 455 (Fla. 1st DCA 2001); White v. State, 731 So.2d 74 (Fla. 2d DCA 1999); Oliver v. State, 691 So.2d 1126 (Fla. 1st DCA 1997); Golden v. State, 509 So.2d 1149 (Fla. 1st DCA 1987). In Garcia v. State, 736 So.2d 89 (Fla. 4th DCA 1999), the Court stated:

> While Garcia admits that his attorney relayed this offer, Garcia claims that counsel waited until the last minute to convey the offer, failed to discuss with Garcia the details and the strength of the State's case, urged Garcia not to take the deal because he would succeed at trial, erroneously advised Garcia that he would get one-third knocked off any sentence he did receive, and failed to advise Garcia that he was the subject of a three-year minimum mandatory for use of a firearm.

A defendant cannot be advised of a plea offer in an informational vacuum. A criminal defense lawyer has an absolute duty under the Constitution and under the Rules of Criminal Procedure to make sure that he properly conveys a plea offer to a client including all relevant information concerning the plea offer, and must make certain that his client understands what he is telling the client. If a defense lawyer does not believe his client understands what he is relaying to him in terms of the details and information concerning the plea offer, the defense lawyer has an absolute duty to bring that lack of understanding issue to the attention of the Trial Court, especially if the defense lawyer believes the lack of understanding is due to mental incompetency.

In the instant case, it is absolutely clear that the criminal defense lawyer for Mr. Casler was deficient in failing to properly and fully relay the plea offer to Mr. Casler. Mr. Casler is now serving life imprisonment without parole sentence for first-degree murder. Mr. Casler testified that had he been properly advised of the plea offer and the circumstances surrounding the plea offer, he would have accepted the plea to second-degree murder. He has demonstrated prejudice since he would have received a term of years instead of life imprisonment without parole.

Mr. Blankner testified that his understanding of the plea offer was that the State would allow Mr. Casler to plea to second-degree murder and to a guideline sentence. Mr. Blankner at the time of receiving the plea offer and discussing the plea offer with Mr. Casler had no idea what the proper sentencing guideline range was. So how could Mr. Blankner possibly relay any intelligible offer to the Defendant? Of course, he could not. The transcript of the first day of trial on May 11, 1998, shows that apparently at a sidebar conference Mr. Blankner incorrectly assumed that the guideline range was 30 to 50 years for a second-degree murder plea. He was promptly corrected by the prosecutor who indicated that the proper guideline range had a mid-point of 30 years with 25 percent difference below and above the 30-year mid-line range. Importantly, Mr. Blankner testified that the plea offers that he discussed with the Defendant occurred prior to that sidebar conference. Therefore, it would have been impossible for Mr. Blankner to have relayed a correct plea offer to Mr. Casler.

That State argues that no evidence was presented at the hearing or in the record as to the correct sentencing guidelines range for Mr. Casler had he entered a plea to second-degree murder. On the contrary, the prosecutor put this information in the record on May 11, 1998, at a conference prior to the commencement of jury selection. The prosecutor is responsible for preparing the sentencing guidelines scoresheet. Prosecutor Ashton's representation as to the sentencing guideline range at the conference on May 11, 1998, is competent evidence of the guideline's range and of Mr. Blankner's lack of knowledge as to that range. Mr. Ashton represented to the Court, in correcting Mr. Blankner's erroneous information, that 30 years was the mid-point, with a range of 25% above or below that mid-line range. So the record shows that the correct guideline range in this case was 22 1/2 years to 37 1/2 years. Additionally, the defense lawyer's failure to document in any way in his office notes or files the communication of the plea offer from the prosecutor to him as

well as the communication of the plea offer from Mr. Blankner to Mr. Casler is evidence of the deficiency of counsel in this case. The State may argue that it does not matter if Mr. Blankner properly conveyed the plea offer to Mr. Casler since Mr. Casler indicated that he did not feel he was guilty. Regardless of a criminal defendant's denial of charges, this does not excuse the defense lawyer from properly conveying all plea offers to the client.

The State may also argue that Mr. Casler in his Motion for Post-Conviction Relief stated that the plea offer was made to him shortly before trial even though he testified at the hearing that the conversation occurred after jury selection but before opening statements. The defense submits that a fair interpretation of Mr. Casler's testimony is that he considered the brief May 12, 1998, conference with Mr. Blankner as having occurred shortly before trial since it took place shortly before opening statements, which he considered or construed to be shortly before trial.

The evidence presented at the evidentiary hearing was uncontroverted that Mr. Blankner could not possibly have conveyed the material aspects of the plea offer to Mr. Casler since he did not properly compute the sentencing guideline range and since he stated that Mr. Casler did not understand what he was telling him in any event. Mr. Casler was never advised as to the correct consequences of the plea offer. Lewis v. State, 751 So.2d 715 (Fla. 5th DCA 2000) (failure of defense counsel to make defendant aware of consequences of habitualization and the possibility of 30-year sentence prejudiced defendant, and thus amounted to ineffective assistance; the defendant testified that had he been aware of the potential penalty he faced, he would have accepted plea offer, and acceptance of plea offer would have resulted in a lesser sentence).

In Brazail v. State, 27 FLW D 1606 (Fla. 1st DCA 2002), the Court stated that the critical inquiry, for purposes of determining the prejudice prong of ineffective assistance of counsel in plea proceedings, is not whether the defendant would have ultimately fared better had he not entered the plea, but is instead whether he would have entered the plea had he been competently advised by his counsel. Merely because Mr. Casler professed his innocence was not a reason to excuse a failure by defense counsel to properly convey a plea offer.

II. DEFENSE COUNSEL WAS DEFICIENT IN RELAYING A PLEA OFFER TO THE DEFENDANT IN AN INFORMATIONAL VACUUM WHEN DEFENSE COUNSEL FELT THAT DEFENDANT WAS MENTALLY INCOMPETENT TO UNDERSTAND THE INFORMATION THAT WAS BEING RELAYED TO HIS CLIENT, AND HE DID NOT ALERT THE COURT TO THESE CONCERNS.

Attorney Blankner at the evidentiary hearing testified unequivocally that when he relayed the State's plea offer to Mr. Casler that he believed that Mr. Casler did not understand what he was relating because he felt Mr. Casler was mentally incompetent at the time of the communication of the plea offer. Mr. Blankner testified without contradiction that he felt that Mr. Casler was mentally incompetent to understand the plea offer being relayed to him. Mr. Blankner's testimony in this regard was unrefuted. See Feldpausch v. State, 27 FLW D 1062 (Fla. 2d DCA 2002) (the trial court cannot reject testimony given by an attorney in a 3.850 evidentiary hearing merely because the court in that case "did not wish to believe" the testimony given by the lawyer absent evidence to the contrary).

Florida Rule of Criminal Procedure 3.210(b) in regards to incompetency to proceed states, in part:

(b) Motion for Examination. If, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition, which shall be held no later than 20 days after the date of filing of the motion, and shall order the defendant to be examined by no more than 3, nor fewer than 2, experts prior to the date of the hearing. Attorneys for the state and the defendant may be present at the examination.

(1) A written motion for the examination made by counsel for the defendant shall contain a certificate of counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is incompetent to proceed. To the extent that it does not invade the lawyer-client privilege, the motion shall contain a recital of the specific observations of and conversations with the defendant that have formed the basis for the motion.
(emphasis supplied)

The Florida Supreme Court in Cottle v. State, *supra*, held that in regards to an ineffective assistance of counsel claim in failing to properly communicate a plea offer:

> This analysis extends to challenges arising out of the plea process as a critical stage in criminal adjudication, which warrants the same constitutional guarantee of effective assistance as trial proceedings. (emphasis supplied)

733 So.2d 963 at 965.

Since Mr. Blankner testified that he believed that Mr. Casler was mentally incompetent to understand the plea offer being made to him, Mr. Blankner had a constitutional duty to advise the Court of his belief that Mr. Casler was incompetent at that particular stage of the proceeding. Florida Rule of Criminal Procedure 3.210 provides that if "at any material stage of the criminal proceeding" defense counsel has reason to believe that the defendant is not mentally competent to proceed, the issue should be considered by the Court. It does not matter that defense counsel previously raised the Defendant's mental incompetency to proceed to trial. When Mr. Blankner felt that the Defendant was incompetent to proceed in terms of understanding the plea offer, he had an absolute duty under the rules and the Constitution to bring this matter to the Court's attention. A finding of competency to proceed at one stage of the proceeding does not prevent or bar a finding of incompetency to proceed at another stage of the proceeding. In fact, the rule imposes a continuing duty on counsel to alert the Court if defense counsel believes the client is mentally incompetent to proceed at any material stage of the proceedings. He was clearly deficient in failing to do so.

Broomfield v. State, 788 So2d 1043 (Fla. 2nd DCA 2001) is instructive on this issue. In that case, the Court held that criminal defense counsel was ineffective for failing to investigate defendant's competency before the defendant pled "guilty" to two felony charges. In that case, unlike Mr. Casler's case, Mr. Broomfield's defense counsel's personal assessment was that the defendant was competent to enter a plea. The Court stated:

> We reverse because trial counsel was ineffective in failing to investigate Broomfield's competency at the time of his plea.

> Because a finding of incompetency would prohibit the state from seeking a conviction,...the failure to take action to determine the defendant's competency would rise to a level of ineffective assistance of counsel if there was evidence to support the defense.

In this case, defense counsel's impressions when communicating the plea offer to Mr. Casler were that Mr. Casler was mentally incompetent to understand the plea offer. At that point, defense counsel was compelled to alert the Court to his impression that Mr. Casler was incompetent to understand the plea and to request another competency hearing. The Florida Supreme Court in Cottle, *supra*, recognized that the issue of acceptance of a plea offer proceedings constitute a critical stage of the adjudication process. Defense counsel is not excused from raising to the Court the Defendant's mental competency during the relating of a plea offer, even though some time earlier on in the case, defense counsel raised competency to proceed to trial. Defense counsel was inadequate in failing to request the Court to conduct a competency evaluation of the Defendant for purposes of evaluating his competency to evaluate a plea offer.

Separately, if defense counsel feels for any reason that the Defendant does not understand a plea offer, which Mr. Blankner unequivocally testified to in this case, counsel has the obligation to spend as much time with the client as necessary to make sure the client understands the plea offer. In this case, it is clear that Mr. Blankner did not do this by his own admission. In fact, Mr. Blankner did not write the client a letter or any other type of written memorandum summarizing the case, the pros and cons of the case, and presenting the plea offer to the Defendant. If defense counsel believes, as Mr. Blankner testified, that the Defendant did not understand what he was saying to him, and counsel takes no further steps, this clearly constitutes ineffective

assistance of counsel. If a lawyer talks to the client, and the client does not understand what the lawyer is saying, there has been no communication. If a lawyer knows or believes a client does not understand what the lawyer is saying, the lawyer must do something about it.

Mr. Blankner also did not explain to Mr. Casler anything about "gain time". Most importantly, Mr. Blankner, without question, conveyed the State's plea offer to Mr. Casler in an informational vacuum in that defense counsel did not even ascertain what the sentencing guideline range was for the Defendant in the plea offer with him. These failures constitute inexcusable neglect and was ineffective assistance of counsel.

RELIEF REQUESTED

Mr. Casler requests this Court to enter an Order granting his Motion for Post Conviction Relief on the basis set forth on this memorandum, as well as for all the grounds set forth in his previously filed Motion for Post Conviction Relief pursuant to Florida Rule of Criminal Procedure 3.850. As to the relief requested, the Defendant requests this Court to vacate his Judgment and Sentence and remand the case to Trial Court for either a new trial or for resumption of "good faith" plea negotiations. As stated in Feldpausch v. State, 27 FLW (D) 1062 (Fla. 2nd DCA 2002):

> This Court has suggested that if a defendant prevails on a motion for post conviction relief based on the failure of his counsel to convey a plea offer, the parties should engage in a "good faith resumption of plea negotiations".... Should such negotiations fail, the only relief available to Feldpausch would be a new trial.

See also, Lewis v. State, 751 So2d 715, 718 (Fla. 5th DCA 2000; Eristma v. State, 766 So2d 1095 (Fla. 2nd DCA 2000).

I HEREBY CERTIFY that a true copy of the foregoing was hand-delivered to Chris A. Lerner, Assistant State Attorney, Office of the State Attorney, Felony Division 36, 415 N. Orange Avenue, Orlando, FL 32801, this 5th day of September, 2002.

s/Warren Lindsey

WARREN W. LINDSEY, of
KIRKCONNELL, LINDSEY,
SNURE AND YATES, P.A.
1150 Louisiana Avenue, Suite 1
Winter Park, FL 32789
Mail: P.O. Box 2728
Winter Park, FL 32790
Telephone: (407) 644-7600
Facsimile: (407) 645-0805
Attorneys for the Defendant.
Attorney No. 299111

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO. CR96-13147

STATE OF FLORIDA,

Plaintiff,

vs.

CRAIG AVERY CASLER,

Defendant.
_____/

MOTION FOR POST-CONVICTION RELIEF PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.850

The Movant, CRAIG AVERY CASLER, who is presently under the judgment and sentence of this Court, individually and through his undersigned attorney, hereby submits this Motion for Post-Conviction Relief pursuant to Florida Rule Criminal Procedure 3.850, utilizing applicable portions of the model form for use suggested by Florida Rule Criminal Procedure 3.987, and moves this Court for entry of an Order vacating the judgment of guilt and the sentence imposed by this Court. As grounds, the Movant states:

1. Name and location of the Court which entered the judgment of conviction under attack:

Circuit Court, Ninth Judicial Circuit, In and For
Orange County, Florida, Orlando, Florida
Florida Circuit Judge Belvin Perry, Jr.

2. Date of judgment of conviction:

Found guilty by a jury on May 15, 1998, judgment and sentence entered that same day.

3. Length of sentence:

Life imprisonment without the possibility of parole.

4. Nature of offense(s) involved (all counts):

One count of first degree premeditated murder.

5. What was your plea?

(a) Not guilty.

6. Kind of trial:

(a) Jury trial before the Honorable Circuit Judge Belvin Perry, Jr., which began on May 11, 1998.

7. Did you testify at the trial or any pre-trial hearing?

Yes, I testified at trial.

8. Did you appeal from the judgment of conviction?

Yes.

9. If you did appeal, answer the following:

A. FIRST APPEAL:

(a) Name of Court:

Fifth District Court of Appeal

(b) Result:

Judgment affirmed without an opinion, with a mandate issued in DCA Case No. 98-1706 on August 23, 1999

(c) Date of result:

Decision dated June 15, 1999

(d) Citation (if known):

Casler v. State, 740 So.2d 552 (Fla. 5th DCA 1999)

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc., with respect to this judgment in *this* Court?

No.

11. If your answer to number 10 was "yes", give the following information (applies only to proceedings in *this* court):

(a)(1) Nature of the proceeding:

Not applicable due to negative answer given to question 10 above.

(2) Grounds raised:

(3) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

(4) Result:

(5) Date of result:

12. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc., with respect to this judgment in any other Court?

Yes.

13. If your answer to number 12 was "yes", give the following information:

(a)(1) Name of court: United States District Court, Middle District of Florida, Orlando Division

(2) Nature of proceeding: 28 U.S.C s.2254 habeas petition

(3) Grounds raised:

a. Prosecutorial Misconduct denied Casler due process at trial.

b. Casler denied due process when convicted on less than proof beyond a reasonable doubt.

c. Denial of due process when State was relieved of its burden proving Casler's sanity beyond a reasonable doubt.

d. Casler was denied due process by the state appeal court's per curium affirmance of his judgment and sentence.

(4) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

No.

(5) Result:

Dismissed with prejudice.

(6) Date of result:

April 18, 2000 [Case No. 6:00-cv-053-Orl-22B].

No subsequent petition, application, motion, etc., was filed.

14. State *concisely* every ground on which you claim that the judgment or sentence is unlawful. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and the *facts* supporting them.

For your information, the following is a list of the most frequently raised grounds for post-conviction relief. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed. However,

you should raise in this motion all available grounds (relating to this conviction) on which you base your allegations that your conviction or sentence is unlawful.

DO NOT CHECK ANY OF THESE LISTED GROUNDS.

If you select one or more of these grounds for relief, you must allege facts. The motion will not be accepted by the Court if you merely check *(a)* through *(l)*.

(List of available grounds omitted)

A. Ground One:

Denial of effective assistance of trial counsel as guaranteed by the Sixth Amendment to the United States Constitution.

Supporting FACTS:

(1) TRIAL COUNSEL WAS INEFFECTIVE IN HIS HANDLING OF THE ALLEGED PRIOR BAD ACT "LINDA BRAY ASSAULT INCIDENT" BECAUSE COUNSEL FAILED TO RECOGNIZE THAT THERE WERE CIRCUMSTANCES UNDER WHICH THE DEFENSE COULD "OPEN THE DOOR" TO SUCH EVIDENCE COMING IN EVEN THOUGH THE DEFENDANT HAD NOT BEEN ADJUDICATED GUILTY OF COMMITTING A CRIME AGAINST LINDA BRAY. THE INCIDENT CLEARLY WOULD NOT HAVE COME INTO EVIDENCE BUT FOR TRIAL COUNSEL'S ACTIONS THROUGH HIS

PRESENTATION OF THE DEFENSE CASE/WITNESSES.

(a) The Defendant was charged in the case at bar with the premeditated murder of a woman named Judith Johnson in October of 1996. Ms. Johnson sometimes stayed at Mr. Casler's apartment.

(b) Mr. Casler's trial took place in May of 1998. On May 15, 1998, after lengthy deliberations, the jury returned a verdict finding him guilty as charged. On that same day he was adjudicated guilty and sentenced to life imprisonment.

(c) At Defendant's trial, the State succeeded in getting harmful evidence and argument before the jury indicating that the Defendant had on 1/2/96 engaged in violent, unlawful conduct against a former girlfriend named Linda Bray.

(d) The record reflects that defense counsel, throughout the trial proceeding, labored under the legally incorrect assumption that evidence of the "Linda Bray incident" would be per se inadmissible since the Defendant had not been formally adjudicated of an offense which would subject him to impeachment for a prior conviction under Fla. Stat. s.90.610.

(e) Because trial counsel failed to understand and appreciate that damaging evidence of

the "Linda Bray incident" could become both relevant and admissible if the defense opened the door--counsel did not properly prepare and instruct key defense witnesses like the Defendant and Dr. Glenn Caddy, a forensic and clinical psychologist, to focus their testimony on the charge at hand; as opposed to giving expansive testimony which could create an opportunity for the State to get the Linda Bray incident before the jury.

(f) Having never been properly instructed by defense counsel on the need to focus his testimony on the charged offense involving Judith Johnson, the Defendant gave unnecessarily expansive direct examination testimony to the effect that he had "never hit a woman".

(g) Having never been properly instructed by defense counsel on the need to keep his expert testimony focused on the charged offense and his opinions as to the Defendant's lack of sanity at the time of the offense and his inability to premeditate,--Dr. Caddy quite unnecessarily volunteered on direct examination that Mr. Casler did not have a "substantial history of violence".

(h) With the defense having thus "opened the door", the State engaged in very damaging and prejudicial cross-examination of both

the Defendant and Dr. Caddy about the "Linda Bray incident".

(i) The aforedescribed "opening of the door" was completely avoidable; and it directly resulted from counsel's misapprehension about the potential admissibility of the "Linda Bray incident". As a consequence of counsel's misapprehension and resulting failure to properly prepare defense witnesses for their trial testimony, Defendant's jury heard about the Bray assaultive incident of 1/2/96, as well as Linda Bray's rebuttal testimony to the effect that the Defendant had hit her on more than one occasion.

(j) Counsel's failure to understand how unprepared defense witnesses could inadvertently "open the door" (and thereby turn the otherwise irrelevant "Linda Bray incident" into admissible evidence) also led to the prosecutor engaging in a closing argument containing extremely prejudicial themes asserting the jury did not have a complete picture of the Defendant's criminal history; asserting that defense counsel had provided defense expert, Dr. Caddy, with a sanitized, untrustworthy version of Defendant's criminal history; and asserting that Dr. Caddy was deficient for not taking affirmative action to obtain the unsanitized version from the State, rather than just being a conduit for the

inaccurate information provided by defense counsel.

(k) Counsel's failure to understand how the "Linda Bray incident" could be transformed into admissible subject matter if the defense case and witnesses "opened the door"; and counsel's related failure to avoid this pitfall by appropriately preparing the Defendant and Dr. Caddy for their trial testimony represents a substantial and serious deficiency in representation measurably below the standard of effectiveness envisioned by the Sixth Amendment to the United States Constitution.

(l) Counsel's failure in the above-stated regard prejudiced Defendant within the meaning of Strickland v. Washington, 466 U.S. 668 (1984), because it resulted in the jury hearing otherwise completely inadmissible evidence indicating that the Defendant had previously been physically violent toward a girlfriend other than the deceased Judith Johnson.

(m) Counsel's failure to understand how the defense case could "open the door" to evidence of the "Linda Bray incident" further prejudiced Defendant at trial because it furnished the prosecutor with the opportunity to vigorously impeach both the Defendant and Dr. Caddy about the Linda Bray incident; ultimately led to

Linda Bray being called as a rebuttal witness; and furnished the prosecutor with devastating closing argument themes designed to convince the jury that the Defendant and Dr. Caddy were not credible witnesses, and that defense counsel had purposely sought via Dr. Caddy to give the jury a false impression of Defendant's criminal history.

(n) But for counsel's misapprehension of how evidence of the "Linda Bray incident" could be transformed from inadmissible evidence into admissible evidence--and counsel's related failure to prepare defense witnesses so that they would not inadvertently "open the door" to "Linda Bray" evidence--Defendant's jury would not have been apprised of the otherwise irrelevant "Linda Bray incident"; and this serious prosecutorial attack on the credibility of the key defense witnesses would never have taken place.

(o) But for counsel's conduct and omissions in the above-stated regard, there is a reasonable likelihood that Defendant's jury would have returned a verdict of not guilty on the charged offense of premeditated first degree murder; and instead found the Defendant not guilty, not guilty by reason of insanity, or else guilty of one of the lesser included offenses such as second degree murder or manslaughter.

(2) TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO ADEQUATELY PREPARE DR. CADDY TO GIVE TRIAL TESTIMONY SO THAT THE WITNESS WOULDN'T INADVERTENTLY "OPEN THE DOOR" TO CROSS-EXAMINATION ABOUT THE LINDA BRAY INCIDENT; AND SO THE EXPERT WOULDN'T BE CAUGHT OFF-GUARD AND TOTALLY UNPREPARED SHOULD THAT SUBJECT COME UP DURING CROSS-EXAMINATION.

(a) The Defendant realleges and incorporates by reference the allegations contained in Paragraph 1(a) through (o).

(b) The Defendant was apparently arrested and prosecuted in connection with the Linda Bray incident report of 1/2/96, which contained the allegation that the Defendant had entered her residence and threatened her while holding a knife. This separate and unrelated prosecution resulted in the Defendant pleading guilty or nolo contendere to a criminal offense; however, he was not formally convicted because adjudication of guilt was withheld.

(c) Trial counsel was aware of the Linda Bray incident and possessed a copy of the incident report.

(d) Dr. Caddy was the key defense witness at Defendant's trial since his expert testimony was the foundation of

Defendant's insanity defense and his voluntary intoxication defense.

(e) At no time prior to trial did counsel furnish a copy of the Linda Bray incident report to Dr. Caddy--although counsel did communicate some sort of generic description of the Linda Bray incident to Caddy. In the description furnished to Dr. Caddy, trial counsel neglected to mention that in her accusation Ms. Bray had claimed she had been threatened by the Defendant who was wielding a knife.

(f) Counsel's failure to prepare Dr. Caddy for his trial testimony (by advising him to steer clear of testimony about the Defendant's relative lack of a criminal history for violence), so that the witness would not inadvertently "open the door" to evidence regarding the Linda Bray incident was a substantial and serious deficiency in representation measurably below the standard of effectiveness guaranteed by the Sixth Amendment to the United States Constitution.

(g) Counsel's failure to inform Dr. Caddy that the "Linda Bray incident" purportedly involved the claim that she had been threatened by the Defendant who was armed with a knife; and counsel's related failure to provide Dr. Caddy with a copy of the 1/2/96 Bray incident report was a substantial and serious deficiency in

representation that resulted in Dr. Caddy inadvertently "opening the door"--thus transforming what would have otherwise been inadmissible evidence into admissible evidence.

(h) And once Dr. Caddy's testimony "opened the door", counsel's failure to have properly and fully informed Dr. Caddy regarding the Linda Bray incident resulted in the State being able to substantially impeach Dr. Caddy's testimony and credibility by a scathing cross-examination designed to make it look as if his opinions were based on misinformation spoon-fed to him by defense counsel.

(i) Counsel's failure to adequately prepare Dr. Caddy for his trial testimony vis-à-vis the Linda Bray incident prejudiced Defendant at trial by: (1) resulting in the jury hearing about the otherwise inadmissible Linda Bray incident; and (2) needlessly exposing Dr. Caddy to severe impeachment.

(j) Counsel's omissions prejudiced Defendant within the meaning of Strickland v. Washington, id., because the omissions led to the admission of harmful evidence, and the occurrence of argument and impeachment efforts which struck at the heart of the defense case.

(k) There is a reasonable likelihood that Defendant's jury would have returned a

verdict of not guilty on premeditated murder (finding the Defendant not guilty, not guilty by reason of insanity, or guilty of some lesser offense), had counsel's actions and omissions not unnecessarily created the perfect opportunity for the prosecutor to portray Dr. Caddy as a misinformed hired-gun expert whose testimony should be rejected.

(3) TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO ADEQUATELY PREPARE THE DEFENDANT TO GIVE TRIAL TESTIMONY WHICH WOULD NOT "OPEN THE DOOR" TO THE JURY HEARING ABOUT ANY VIOLENT ACTS BY HIM TOWARD LINDA BRAY.

(a) The Defendant took the stand. The basic gist of his testimony was that he had no recollection of whether he had fought or argued with Judith Johnson prior to her being found dead at his apartment on October 25, 1996.

(b) Even though trial counsel knew of the "Linda Bray incident"; and also knew that Ms. Bray would likely claim, if called as a witness, that the Defendant had demonstrated violence toward her while they were romantically involved--counsel did not advise the Defendant of the importance of making sure that his trial testimony focused on the charged offense and his relationship with Judith Johnson.

(c) As a consequence of counsel's failure to properly prepare the Defendant to be a witness the Defendant broadly testified on direct examination that "I never hit a woman in my life".

(d) Counsel's failure to properly prepare the Defendant to be a witness, coupled with the Defendant's testimony as quoted above, ultimately resulted in the Defendant being cross-examined on what would otherwise have been the irrelevant and inadmissible subject of whether he had ever struck Linda Bray; and further resulted in the jury hearing Linda Bray give rebuttal testimony to the effect that the Defendant had struck her on more than one occasion. It also resulted in the Defendant being needlessly impeached.

(e) Counsel's failure to properly prepare the Defendant for his testimony so that he would not "open the door" to the State's ability to put on evidence concerning Linda Bray was a substantial deficiency in representation measurably below the standard of effectiveness envisioned by the Sixth Amendment.

(f) There is a reasonable likelihood that the result of Defendant's trial would have been different--meaning the return of a verdict acquitting the Defendant of premeditated first degree murder, but for counsel's

deficient representation as described above.

(4) TRIAL COUNSEL WAS INEFFECTIVE IN RECOMMENDING THAT DEFENDANT TAKE THE STAND.

(a) At the time of trial the Defendant was a 49-year-old man afflicted by profound brain damage and underlying mental illness. As a consequence of suffering from both organic and functional mental illness, his competence to stand trial was marginal at best due to resulting memory problems, an inability to focus, and a corresponding inability to process information.

(b) Although the Defendant was able to give some testimony on direct examination about his background and his brief romantic relationship with Judith Johnson--the basic gist of his testimony relating to the charge of first degree premeditated murder was that he had no memory of having argued or fought with Ms. Johnson; and certainly didn't believe he could possibly have beaten her to death.

(c) Trial counsel was very familiar with the Defendant's extreme shortcomings when it came to his ability to focus, to think clearly and coherently, or to understand and follow counsel's advice and instructions. Indeed, counsel, on repeated occasions,

urged the court to declare the Defendant incompetent to stand trial.

(d) Trial counsel was also aware of the fact that the gist of any testimony the Defendant could give relating to the charge was that the Defendant had no memory of anything which could shed light on how Judith Johnson ended up dead in his apartment.

(e) The Defendant's profound brain damage and mental illness not only furnished substantial obstacles to his ability to listen carefully to questions and give focused responses--those same afflictions made him extremely vulnerable to being tripped up on cross-examination by the State's prosecutor.

(f) In fact, the Defendant proved to be an uncontrollable witness whose direct examination testimony to the effect that he had "never hit a woman" opened the door to the State later being able to cross-examine him on the otherwise irrelevant topic of whether he had ever hit Linda Bray; and then to the State's calling of Linda Bray to give rebuttal testimony indicating she had been struck by Defendant more than once.

(g) In light of the above-described impediments to the Defendant's ability to testify to anything of probative value; in

light of the much-greater-than-average vulnerability he faced on cross-examination; in light of the potential of "opening the door" to the admission of Linda Bray evidence; and in light of the fact that there was nothing to be gained by having Defendant take the stand which couldn't be gained in another less risky fashion;--trial counsel's action of recommending that Defendant take the stand was a substantial and serious deficiency in representation measurably below the standard of effectiveness guaranteed by the Sixth Amendment.

(h) That any possible benefit to having the Defendant take the stand was substantially outweighed by the damage which was likely to occur (and which did occur), as a consequence of his testifying.

(i) That the Defendant would have refrained from testifying had trial counsel advised him in would be in his best interest to not testify or to subject himself to cross-examination.

(j) But for counsel's deficient performance, as described above, there is a reasonable likelihood that the Defendant would have been found not guilty by reason of insanity, not guilty, or acquitted of first degree premeditated murder by the return of a guilty verdict on a lesser offense.

(5) TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO OBJECT WHEN THE PROSECUTOR CROSS-EXAMINED DR. CADDY WITH QUESTIONS IMPROPERLY SUGGESTING THE DEFENDANT HAD AN EXTENSIVE, EXTREMELY VIOLENT CRIMINAL HISTORY; AND SUGGESTING THAT DR. CADDY HAD SOMEHOW BEEN REMISS IN NOT OBTAINING AN ACCURATE PICTURE OF THE DEFENDANT'S VIOLENT CRIMINAL HISTORY FROM THE STATE.

(a) In his cross-examination of the defense expert psychologist, Dr. Glenn Caddy, the prosecutor phrased two (2) highly objectionable questions to Dr. Caddy in order to get before the jury the unwarranted insinuations that: (1) the Defendant had an extremely violent criminal history; (2) that Dr. Caddy had turned a blind eye to this history of violence even though the State had alerted him to its existence during a discovery deposition; and (3) Dr. Caddy's stated opinions as to Defendant's lack of sanity and lack of ability to premeditate were flawed because of the expert's unwillingness to acknowledge the extreme violence of Defendant's criminal history.

(b) Specifically, the prosecutor made these thoroughly objectionable insinuations by the posing of a question asking Dr. Caddy whether he had asked the State for criminal history background so that he

would have "an accurate picture of Defendant's criminal history", followed in short order by the question of "...so no matter how violent [the Defendant's history is]...it is irrelevant to your determination of this case?"

(c) Despite the highly objectionable (and misleading) nature of these insinuations, trial counsel made no objections.

(d) Counsel's failure to object prejudiced the Defendant because it permitted the State to be unchecked in its effort to taint Defendant's jury with the notions that: (1) the Defendant had a more extreme violent criminal history background than the trial evidence was showing; and (2) defense counsel and Dr. Caddy were hiding information about the Defendant's supposed violent criminal history from the jury.

(e) Counsel's failure to object to these objectionable questions prejudiced Defendant at trial by stripping him of the presumption of innocence and his selected jury's ability to be fair and impartial; and further prejudiced him by foreclosing his ability to obtain appellate relief since the State's error would not be preserved for appellate review in the absence of a contemporaneous trial objection.

(f) Counsel's failure to object constituted a substantial and serious deficiency in representation measurably below the standard of effectiveness secured by the Sixth Amendment.

(g) There is a reasonable likelihood that the result of Defendant's trial would have been different had counsel raised contemporaneous objections to the State's improper and highly prejudicial questions since the lower court could have taken immediate corrective action, or, alternatively, so that the harmful error would have been preserved for appellate review and corrective action.

(6) TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT WHEN THE PROSECUTOR, IN CLOSING ARGUMENT, GAVE INCOMPLETE, MISLEADING EXPLANATIONS OF WHAT IT MEANS TO PREMEDITATE A MURDER.

(a) First degree premeditated murder, a capital offense, is the most serious form of unlawful homicide. As compared with other forms of unlawful killing offenses, its most distinguishable feature or element is the factor known as "premeditation".

(b) The Defendant was convicted, as charged, of premeditated first degree murder. He is currently serving a life sentence without the possibility of parole eligibility.

(c) In order for Defendant's jury to be able to fairly and correctly deliberate on his guilt or innocence as to either the charged offense or as to any of the lesser offenses submitted for jury consideration (second degree murder and manslaughter), it was imperative that Defendant's jury have a correct assessment of the premeditation element.

(d) A premeditated killing, under Florida law, occurs when a killing is the result of a conscious intent or decision to kill combined with a reflection component. When the reflection component is absent, the degree of offense for an intentional killing is reduced to either second degree murder or manslaughter.

(e) At Defendant's trial the prosecutor made comments during closing argument purporting to "explain" the element of premeditation to the jury.

(f) At one point the prosecutor told Defendant's jury that first degree premeditated murder occurred when the actor made a "decision to kill". Even though this was an incomplete and inaccurate statement of the law pertaining to "premeditation" because it conveniently omitted the critical component of reflection, trial counsel made no objection.

(g) Nor did trial counsel object when the prosecutor again defined premeditation in a way which omitted the component of reflection. In this second instance the prosecutor remarked on how it takes thought and intention to kill to pick up a weapon or choke someone; and then told the jury that premeditation was "a thought and…a thought".

(h) Counsel's failure to raise objections to the prosecutor's comments setting forth to the jury legally incorrect descriptions of premeditation (which would work to the Defendant's extreme disadvantage if applied by the jury), was a substantial and serious deficiency in representation measurably below the standard of effectiveness required by the Sixth Amendment.

(i) Counsel's deficient representation prejudiced the Defendant because it allowed the State to go unchecked as it advocated and invited the jury's utilization of an incorrect, watered-down version of premeditation which would undercut the Defendant's voluntary intoxication defense; and which would, in effect, make it easier for the jury to come back with a wrongful finding of premeditation.

(j) There is a reasonable likelihood that the Defendant would have been acquitted of first degree premeditated murder but for

counsel's failure to object in the above-described regard. As a consequence of counsel's failure to object there was no opportunity for the lower court to take corrective action. Counsel's failure to object prejudiced the Defendant on appeal because it also resulted in the loss of any opportunity for the prosecutor's wrongful argument to have been preserved for appellate review and corrective action in that forum.

(7) TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO SEEK SUPPRESSION OF THE ORAL, TAPED, AND WRITTEN STATEMENTS OBTAINED FROM DEFENDANT BY LAW ENFORCEMENT WITHIN A FEW HOURS OF HIS ARREST; AND FURTHER INEFFECTIVE IN INTRODUCING THESE STATEMENTS AND RELATED TESTIMONY INTO EVIDENCE DURING THE DEFENSE CASE-IN-CHIEF.

(a) After 1:00 A.M., on October 25, 1996, a SWAT team converged at Defendant's apartment because the Orlando Police Department had received a report from a man named James Cook indicating that he had been inside Defendant's apartment a few hours earlier and had seen an obviously dead woman inside. Cook's initial report would have indicated that Mr. Casler was also inside the apartment, intoxicated, and acting very strangely. After several hours of not being able to

evoke a response from any occupant of the apartment, the police were able to flush the Defendant out with tear gas. The Defendant was taken into custody and transported to the jail. His chaotic and alcohol-container-strewn apartment was searched through and police indeed recovered the body of a woman who appeared to have been dead for a considerable number of hours.

(b) Later that same morning Orlando Detective Julius Glen Gause, Jr., sought to obtain a taped statement from Defendant. In a bizarre, rambling fashion the Defendant made some inculpatory statements both on and off the tape; as well as scribbling words like "vodka", "money", "lies", "woke up in the bedroom" on a piece of paper. The Defendant also kept repeating the phrase "death and shoelaces".

(c) While the tape was running, the Defendant said something about a young man with a big penis. He said he was an alcoholic with memory problems. He said he'd given Judith Johnson some money on Monday to purchase alcohol and that she'd returned on Wednesday with vodka. When the tape was not running, he said she had swung at him and he'd protected himself.

(d) Due to the Defendant's inability to think and speak in a coherent, logical fashion, his rambling, his inability to focus--Detective Gause eventually terminated the interview attempt.

(e) It would have been apparent to Detective Gause, or it reasonably should have been, from the very outset of trying to conduct an interview that the Defendant was both very impaired by alcohol and in a very disturbed mental state.

(f) As a result of conducting discovery, defense counsel knew or should have known that there existed a basis upon which to seek the suppression of the oral, taped, and written statements obtained by Detective Gause on the morning of October 25, 1996, on the ground that said statements were not made voluntarily because of the Defendant's substantial mental illness and alcohol-related incapacities.

(g) Assuming arguendo, the involuntary nature of Defendant's statements, it would be a violation of the due process clauses of the Florida and Federal Constitutions [Article 1, S. 9 of the Florida Constitution and the 14th Amendment to the United States Constitution] for the State to seek to obtain a criminal conviction through the use of an involuntary statement.

(h) At no time did counsel file and litigate a pre-trial motion seeking the suppression of Defendant's involuntary statements even though counsel knew, or should have known, that there existed a legal and factual basis for concluding that Defendant's statements were not given knowingly and voluntarily; and with full awareness of the nature of the rights being abandoned and the consequences of their abandonment.

(i) Counsel's failure to move to suppress the Defendant's involuntary statements amounted to a failure to prevent the State from being able to use evidence obtained in violation of the Florida and Federal Constitutions in order to convict the Defendant.

(j) There is a reasonable likelihood that a motion to suppress Defendant's statements on grounds of involuntariness would have been granted in light of the totality of the circumstances surrounding the Defendant's arrest and the State's obtainment of the statements.

(k) Trial counsel's failure to seek the suppression of Defendant's statements was a substantial deficiency in representation measurably below the standard of effectiveness guaranteed by the Sixth Amendment.

(l) As Defendant's trial unfolded, however, it was not the State's prosecutor who sought to use the involuntary, inculpatory statements obtained from Defendant--but Defendant's counsel.

(m) During the defense case, trial counsel called Detective Gause as a witness, and through him, published the taped statement, and elicited testimony on the circumstances and content of the various statements obtained from Defendant.

(n) Trial counsel's introduction of Defendant's involuntary statements, and related testimony, was a substantial deficiency in representation measurably below the standard of effectiveness guaranteed by the Sixth Amendment.

(o) Counsel's introduction of this evidence prejudiced Defendant before the jury because its introduction tended to: (1) corroborate some of James Cook's testimony (about the Defendant giving a sort of explanation for why and how Judith Johnson came to be beaten to death), as well as the State's motive theory which speculated that the Defendant killed Ms. Johnson because she was seeing a younger man with a big penis; and (2) suggest that the Defendant may not have been in an "alcoholic blackout" as that term was described by Dr. Caddy.

(p) There is a reasonable likelihood that the Defendant would not have been convicted of first degree premeditated murder had his counsel taken appropriate action to: (1) suppress the Defendant's oral, taped, and written statements so that the State would not have been in a position to possibly use the tainted evidence; and (2) not taken the patently unreasonable action of introducing this prejudicial, tainted evidence to the jury in the defense case.

(8) TRIAL COUNSEL WAS INEFFECTIVE FOR NOT TAKING ACTION TO HAVE DNA TESTING DONE ON FINGERNAIL SCRAPINGS TAKEN FROM DECEDENT JUDITH JOHNSON; AND, SIMILARLY, INEFFECTIVE FOR NOT HAVING LABORATORY TESTING DONE ON VAGINAL SWABS--IN ORDER TO GUARD THE DEFENDANT FROM AN UNWARRANTED CONVICTION FOR THE MURDER OF JUDITH JOHNSON.

(a) As part of the homicide investigation, and the related autopsy examination of Judith Johnson's body, fingernail scrapings (of dried blood) and vaginal swabs were collected and handed over to law enforcement.

(b) Ms. Johnson's lifeless body was found by law enforcement officers in Mr. Casler's apartment on October 25, 1996. At the time of the discovery she had been dead

for hours and hours. She apparently died of injuries sustained in a terrible beating. According to the medical examiner's trial testimony it was not only difficult to pinpoint the time of her death; but also it was not possible to say with any degree of certainty whether she died within a few hours or a few days of the beating being administered.

(c) In between October of 1996, when the fingernail scrapings and vaginal swabs were obtained by the State for use as potential evidence, and the time of Defendant's trial in May of 1998, the State decided it would not bother with having the evidence scientifically tested.

(d) Though the Defendant acknowledges that Ms. Johnson was apparently found dead in his apartment, his underlying brain damage, mental illness and deficiencies, and then-present alcohol impairment left him without any memory and corresponding ability to communicate to his counsel any remotely reliable account of how, in fact, Ms. Johnson suffered her fatal injuries.

(e) Counsel owed the Defendant, his client, the duty to vigorously defend him of the charge. Counsel's duty, in this case, was complicated by the Defendant's inability to relate the events of his life pertaining to

the hours and days immediately leading up to October 25, 1996.

(f) On Defendant's behalf, counsel was pursuing the defenses of insanity and voluntary intoxication. In the course of preparing those defenses counsel was aware of the phenomenon known as "confabulation" whereby persons with profound brain damage will sometimes seek to compensate for memory gaps by making an account up which seems to "fit in" with what is going on and supply the missing pieces.

(g) Defense counsel was also aware that Dr. Caddy was of the opinion that the Defendant's brain damage was so profound that the Defendant's so-called admissions to James Cook (about purportedly beating Ms. Johnson because she had been sleeping with a younger man with a large penis) could well be nothing more than a fabrication tendency known as Korsakoff's psychosis.

(h) Given that possibility, and under the facts of this case, counsel's duty to vigorously defend the Defendant included the duty to seek the submission of the fingernail scrapings and vaginal swabs for scientific testing and DNA analysis.

(i) Counsel's failure to take the initiative to have DNA testing done on the fingernail

scrapings and vaginal swabs (for the purpose of excluding Defendant as perpetrator) was a substantial deficiency in representation measurably below the standard of effectiveness guaranteed by the Sixth Amendment.

(j) Had counsel pursued the above-described scientific testing and received test results implicating the Defendant, those adverse test results would have had no bearing whatsoever on Defendant's ability to raise the intended defenses of insanity and voluntary intoxication.

(k) There is a reasonable likelihood that the results of DNA testing and scientific analysis on the fingernail scrapings and vaginal swabs would have exonerated the Defendant leading to a vastly different prosecution and trial result.

(9) TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE MADE COMMENTS IN CLOSING ARGUMENT ABOUT THE TESTIMONY OF THE MEDICAL EXAMINER THAT WERE NOT SUPPORTED BY THE EVIDENCE.

(a) During closing argument trial counsel told Defendant's jury: (1) the medical examiner had testified he couldn't rule out the possibility that Ms. Johnson had been beat up elsewhere, went home to Defendant's apartment, and then died; (2)

that the medical examiner said Ms. Johnson could have "walked home" after the beating; and (3) that perhaps the neck injuries to Ms. Johnson were the result of someone yanking or pulling on a camp cord "necklace" of sorts she wore around her neck with an apartment key on it.

(b) Not one of the aforementioned statements was supported by the medical examiner's testimony.

(c) For example, the medical examiner clearly indicated that while Ms. Johnson may have lingered on alive for hours or even days after the beating--the beating was so extreme she would have been incapacitated and immobile.

(d) As it related to Ms. Johnson's neck injuries, the medical examiner clearly stated there were internal injuries to the neck which could not have occurred just from having something yanked off the neck.

(e) Counsel's unwillingness or failure to keep his representations of the medical examiner's testimony reasonably accurate during closing argument constituted a substantial deficiency in representation measurably below the standard of effectiveness guaranteed by the Sixth Amendment.

(f) Counsel's arguing of patently unreasonable "interpretations" of the medical examiner's testimony prejudiced the Defendant and the defense case in the eyes of the jury because it sent a message to the jury that the defense was not concerned with accuracy, and therefore, the defense case was not credible or worthy of belief.

(g) There is a reasonable likelihood that the result of Defendant's trial would have been different (meaning the return of a verdict of not guilty, not guilty by reason of insanity, or guilty of some lesser offense) had counsel not squandered defense case credibility by making comments in closing argument which were absolutely not supported by the medical examiner's testimony.

(10) TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY COMMUNICATING THE STATE'S PLEA OFFER TO DEFENDANT IN AN INFORMATIONAL VACUUM.

(a) The Defendant was charged with first degree premeditated murder. Under Florida law, this offense is punishable by only two possible sentences: death or life imprisonment without parole. The Defendant's chief defenses were insanity and voluntary intoxication.

(b) Shortly before trial, the State extended a plea offer to Defendant. The plea offer contemplated that in return for pleading guilty or nolo contendere to second degree murder, the Defendant would receive a guideline sentence of approximately twenty-two (22) years imprisonment.

(c) Counsel told Defendant of this offer while the Defendant was in a holding cell.

(d) Counsel's communication of the offer was not accompanied by any recommendation by counsel as to whether the Defendant should or should not take the offer. When the Defendant asked counsel for advice, all counsel said was that if he took the plea, he would receive a sentence that had "daylight" at the end of it.

(e) The Defendant told counsel that twenty-two (22) years was a long sentence to serve for a crime he didn't believe he had committed, and had no memory of committing.

(f) The Defendant knew he was charged with first degree murder, and he also knew that the State was not seeking the death penalty. However, he did not understand, at the critical point of the plea offer being made, that if he were convicted as charged the only sentence the law would permit would require that he spend the rest of his life in prison without the possibility of

early release and without the possibility of parole.

(g) In the many months of pre-trial incarceration separating his October 1996 arrest and his May 1998 trial, counsel had provided Defendant with very little information about the nature of the State's evidence. In the most general and cryptic terms, counsel had described the State's case as consisting of "James Cook and an autopsy". Counsel had indicated the Defendant should fully expect to be hospitalized. Counsel did not discuss the details of the pre-trial discovery, the details of Cook's expected testimony, and the legal ramifications of what it would mean if the jury chose to believe that the statements Cook attributed to the Defendant were an accurate picture of the events which led to Ms. Johnson's death.

(h) At no time in connection with the State's plea offer did counsel discuss the strengths and weaknesses of the Defendant's case versus the prosecution's evidence. For instance, counsel did not inform the Defendant that Cook's statements about what the Defendant supposedly said to Cook, as "admissions", would be treated as substantive evidence of guilt and could support a conviction for first degree premeditated murder if believed by the jury. Nor did counsel advise the Defendant that the pre-trial discovery

process had not produced any information which would really enable the defense to impeach Mr. Cook's testimony or credibility--and thus provide the jury with a solid reason to reject his testimony. Nor did counsel advise the Defendant, in connection with the plea offer, that the defense of insanity often times is a difficult defense for a jury to accept, as is the defense of voluntary intoxication. Nor did counsel advise the Defendant that, in terms of proving up these two defenses, one of the evidentiary weaknesses in the defense case was that no witness (including the Defendant) was in a position to give direct and positive testimony to the amount of alcohol consumed by the Defendant leading up to the offense, or to the corresponding level of intoxication present at the time of the offense. Nor did counsel advise the Defendant that the offense of conviction and sentence, as contemplated in the State's plea offer, was essentially where the Defendant would stand post-trial should the jury reject his insanity defense, yet determined he was too intoxicated to be able to premeditate.

(i) Counsel's failure to apprise the Defendant of the relative strengths and weaknesses of the State's case versus the defense case so that Defendant could make an informed choice on whether to risk going to trial or to accept the State's plea offer was a substantial and serious deficiency in

representation measurably below the standard of effectiveness guaranteed by the Sixth Amendment.

(j) Counsel's related failures to advise the Defendant that if he were convicted as charged, the only possible sentence was imprisonment for the rest of his life; to advise him that his primary defenses (insanity and voluntary intoxication) are often rejected by deliberating juries though the defenses are recognized at law; or to make an affirmative recommendation to the Defendant--were likewise, individually and collectively substantial and serious deficiencies in representation measurably below the standard of effectiveness guaranteed by the Sixth Amendment.

(k) Counsel's deficient representation, as set forth above, prejudiced Defendant because it meant that he didn't have the information needed to make an informed decision regarding the State's plea offer.

(l) The Defendant would have accepted the State's plea offer had counsel apprised him regarding the relative strengths and weaknesses of the prosecution's case versus the defense case; regarding the "only possible sentence" aspect of a first degree premeditated murder conviction (where the death penalty is not at issue); and regarding the general reluctance on the part of conservative juries to return

acquittal verdicts based on the insanity and voluntary intoxication defenses.

(m) That but for Counsel's above-described omissions the Defendant would now be serving a fairly lengthy guideline sentence for second degree murder versus a never-ending sentence for first degree premeditated murder.

(11) TRIAL COUNSEL WAS INEFFECTIVE IN PUTTING THE DEFENDANT ON THE THE STAND WITHOUT HAVING PREPARED HIM TO BE A WITNESS.

(a) The Defendant realleges and specifically incorporates by reference the allegations of Paragraph (3)(a) through (f), and Paragraph (4)(a) through (j).

(b) The Defendant took the stand and became a witness because his counsel told him to.

(c) At no time prior to calling the Defendant as a witness did trial Counsel go over the Defendant's expected testimony or give him instructions on how to answer questions or conduct himself on cross-examination. Consequently, the Defendant didn't know what to expect on either direct or cross-examination.

(d) Counsel's failure to prepare the Defendant to be a witness resulted in the Defendant giving expansive testimony on direct

examination to the effect that he had "never hit a woman" which then "opened the door" to the State being able to introduce extremely harmful evidence of the "Linda Bray incident". This, in turn, led to damaging cross-examination of the Defendant, and, ultimately, the calling of Linda Bray to give rebuttal testimony about how the Defendant had hit her on more than one occasion.

(e) Counsel's action of putting the Defendant on the stand without first preparing him to be a witness was a substantial and serious deficiency in representation measurably below that standard of effectiveness envisioned by the Sixth Amendment.

(f) Counsel's above-described action prejudiced the Defendant at trial because the unprepared Defendant's expansive testimony transformed the otherwise inadmissible "Linda Bray incident" into admissible evidence and gave the State's prosecutor a golden opportunity to portray the Defendant as abusive and violent as the prosecutor conducted his cross-examination of Defendant; during the State's rebuttal case when Linda Bray was called as a witness; and during closing argument.

(g) There is a reasonable likelihood that the Defendant would have been acquitted of first degree premeditated murder but for

Counsel's action of putting the Defendant on the stand without preparing him to be a witness.

(12) VIEWED CUMULATIVELY, COUNSEL'S ERRORS AND OMISSIONS IDENTIFIED AND DESCRIBED IN THE FOREGOING CLAIMS 1-11 OF THIS 3.850 MOTION JUSTIFY THE GRANTING OF THE POST-CONVICTION RELIEF REQUESTED HEREIN.

(a) The Defendant specifically realleges and incorporates by reference the preceding eleven (11) claims of ineffective assistance of counsel and all supporting factual allegations.

15. If any of the grounds listed in 14(A) were not previously presented on your direct appeal, state briefly what grounds were not so presented and give your reasons they were not so presented:

A Rule 3.850 Motion is an appropriate remedy for the claim that the Defendant received ineffective assistance of trial counsel.

16. Do you have any petition, application, appeal, motion, etc., now pending in any court, either state or federal, as to the judgment under attack?

No.

17. If your answer to number 16 was "yes", give the following information:

Not applicable due to negative answer given to question 16.

18. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At trial: Trial counsel was:

F. Wesley Blankner, Jr.
217 E. Ivanhoe Blvd. North
Orlando, FL 32804

(b) At sentencing:

[same as above]

(c) On appeal:

[same as above]

WHEREFORE, Movant prays that the Court grant all relief to which he may be entitled in this proceeding, including but not limited to:

1. That the Defendant be afforded a full evidentiary hearing in this matter.

2. Defendant requests this Court vacate the judgment and sentence in this matter.

3. That the Defendant be allowed to file a memorandum of law in support of his motion, and be allowed to amend and supplement the memorandum of law up to and including the commencement of the requested evidentiary hearing.

4. That the Defendant be allowed to amend and supplement this motion up to and including the commencement of the requested evidentiary hearing.

5. That after a full evidentiary hearing in this matter, the Defendant be discharged from his unconstitutional confinement and restraint.

6. Such other and further relief as the Court deems just and proper, regardless of whether this motion is treated as a 3.850 Motion, a 3.800(a) Motion to correct sentence, or some other petition for relief.

STATE OF FLORIDA

COUNTY OF GULF

BEFORE ME, the undersigned authority, this day personally appeared, CRAIG AVERY CASLER, who first being duly sworn, says that he is the Defendant in the above-styled cause, that he has read the foregoing Motion for Post-Conviction Relief, and has personal knowledge of the facts and matters therein set forth and alleged; and that each and all of these facts and matters are true and correct.

s/Craig Avery Casler
CRAIG AVERY CASLER

SWORN AND SUBSCRIBED TO (or affirmed) before me this 20 day of August, 2001, by CRAIG AVERY CASLER. He is personally known to me or has produced Dept. Of Corrections identification as identification.

s/Warren Lindsey
Notary Public
Type/Print/Stamp Name:
My Commission Expires:

(seal) Notary Public, State of Florida, Warren Lindsey, My Commission CC925006, Expires June 02, 2004

I HEREBY CERTIFY that a true copy of the foregoing was hand-delivered to the Office of the State Attorney, Felony Division 36, 415 N. Orange Avenue, Orlando, FL 32801, this 21st day of August, 2001.

s/Warren Lindsey
WARREN W. LINDSEY, of
KIRKCONNELL, LINDSEY, SNURE AND YATES, P.A.
1150 Louisiana Avenue, Suite 1
Winter Park, FL 32789
Mail: P.O. Box 2728
Winter Park, FL 32790
Telephone: (407) 644-7600
Facsimile: (407) 645-0805
Attorneys for the Defendant.
Attorney No. 299111